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Advocacy at Petty Sessions

B. FRASER HARRISON

Solicitor of the Supreme Court

'May I say in praise of the book that it could have been written by anyone with a large and varied experience as an advocate in magistrates' courts—or, at least, it gives that impression. Its author attempts no fine writing, nor does he seek, after the manner of some advertisements for correspondence courses, to unfold the secret of forensic brilliance in five simple rules. His message is that of one whose practice as an advocate has taught him certain lessons (in the modern idiom—he has picked up the know-how in the hard way) and he is willing to share what he has learned with the less experienced. It is as much a book for the advocate in his office as for the advocate in court: it puts ABC before XYZ, that is, in the right order.'—*The Law Society's Gazette*

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THE

CRIMINAL LAW REVIEW

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Editorial

1958

With this issue *The Criminal Law Review* enters upon its fifth year and we are pleased to note that the *Review* seems to be as popular as ever. In compiling each number we try to please as many of our readers as we can and we are therefore always anxious to have their suggestions, opinions and criticisms brought to our notice. And, of course, we are always pleased to add new names to our list of learned contributors.

One of our principal aims is to keep ourselves and our readers up to date with the world of criminal law, and this is, in part, achieved by our regular features such as Case and Comment, Acts and Orders, Practice and Procedure for which we are always pleased to receive material. In this issue, however, we should like to draw our readers' attention to two articles in particular. In " Mechanical Aids to Evidence," at p. 5, Mr. D. W. Elliott considers a number of recent cases on the uses of photographs and tape recordings in the criminal courts, while at p. 15 Mr. J. W. Cecil Turner discusses the highly controversial interpretation given in the *Vickers* case to section 1 (1) of The Homicide Act, 1957.

Forensic Science

We are pleased to announce that Dr. J. B. Firth, D.SC., F.R.I.C., at present Director of the North-Western Forensic Science Laboratory at Preston, will become Adviser in Criminal Science to this *Review* as soon as his retirement becomes effective in the New Year.

Passing sentence

The change of emphasis from punishment to treatment of offenders which resulted from the provisions of the Criminal Justice Act, 1948, has presented those responsible for passing sentence with the difficult problem of suiting treatment to the crime and to the offender.

In a recent article in *The Times,*[1] Dr. Hermann Mannheim discusses the nature of this problem. He points out that the problem of finding the " right relation " between crime and sentence has four aspects:—

" First, there have to be communal values, so that the law-giver can establish as a generally accepted principle whether, for example, cruelty to children should (other things being equal) be more severely punishable than cruelty to animals. Secondly, the courts need guidance in determining what they are to regard as mitigating or aggravating offences in individual cases. Thirdly, they need all the obtainable factual and scientific knowledge to decide which of those factors are present in a given case. Lastly, they have to know something about the likely effect of their sentences if they are to choose wisely among the treatments they may administer."

Much has been done in the past year in the way of research under the last two headings, due in part to the keen interest shown by the Home Secretary, Mr. R. A. Butler, in problems of penology and the work of such bodies as the Howard League for Penal Reform.[2]

Research under the first two headings is designated by Dr. Mannheim as the domain of the legal philosopher, the criminal lawyer and the sociologist, and it is in these spheres that very little progress has been made. What appears to be necessary, initially, is that the courts should have some opportunity of obtaining and considering all the necessary information about the personality and social background of the offender. At present, as Mr. Butler stressed recently, the sittings of assizes and quarter sessions in the provinces are so infrequent that pre-sentence inquiry into such matters is impracticable. However, the Home Office Advisory Council has proposed that, in all cases involving adult first offenders for whom imprisonment is contemplated, pre-sentence inquiries should be made obligatory.

Before any legislation can be passed, either on the subject of sentences themselves, or the use of them, more research into the present use of sentences must be undertaken. At present research is being carried out, either by the Home Office, or by the universities under Home Office auspices, into the problems of maximum fines, the policies of selected provincial juvenile courts, the metropolitan juvenile courts, and into variations in the use of imprisonment by magistrates' courts.

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[1] November 26, 1957.

[2] See *Prisons and Borstals,* revised 1957, published by H.M. Stationery Office at 5s. net.; also [1957] Crim.L.R. 2, 79, 216, 278, 560, 770.

Criminal statistics, 1956

The Home Office have now published the Criminal Statistics for England and Wales for 1956.[3] The statistics show a continuation in the upward trend in the total number of indictable offences which began in 1955. From the number of convictions the increase appears to be more rapid among boys and young men. There was a sharp increase in the number of offences of violence against the person, and also in breaking and entering offences.

"Licked"

Among scientific tests carried out in a recent case against a motor dealer for demanding money with menaces was the grouping of the saliva on the flaps of the envelopes containing the threatening letters. The defendant, Fred Mason Evans, was arrested after he had twice been seen in the vicinity of the place where the money he demanded was to be left. On him were found two notebooks and two ball-point pens. When a sheet from one of the notebooks was examined it was found to bear the impression of one of the letters. The pens were tested and were found to hold ink similar to that in which the threatening letters were written.

Giving evidence for the prosecution, a biological chemist from the West Midland forensic science laboratory said that with "secreters" (who made up three-quarters of the population), it was possible to classify their saliva into groups corresponding with blood groups.

Evans was committed on bail for trial at Birmingham Assizes.

Oxford or Borstal?

In the editorial to our September, 1957, issue we reported an interesting experiment in human relations when a number of Oxford undergraduates spent a fortnight under canvas with some youths undergoing Borstal training at Hatfield, an "open" Borstal. The *Manchester Guardian* now reports that some of the undergraduates who attended the camp have gained permission to renew the friendships made there by spending a week in the institution.

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[3] Cmnd. 286. Published by H.M. Stationery Office at 7s. net.

They will lead exactly the same life as the Borstal boys, even to attending the same educational classes. The governor of the institution is enthusiastic about the scheme and the help which it will give to the boys under his care.

Double white lines

The Minister of Transport has pointed out that, although it has not yet been made an offence to cross a double white line on a road, the police can cite the disregarding of the rules relating to double white lines as evidence of bad driving in any prosecution they may bring against a driver. It is intended to give legal effect to the existence of double white lines sometime next autumn.

Parliament

Obscene publications

A Select Committee with power to send for persons, papers and records has been appointed to consider whether it is desirable to amend and consolidate the law relating to obscene publications. Minutes of the Evidence taken before the Select Committee on the Obscene Publications Bill in the last Session of Parliament and the Appendices thereto have been referred to the Committee (H.C. Debates, Vol. 577, col. 350, November 19, 1957).

Judicial appointments

Gerald Alfred Thesiger, Esq., M.B.E., Q.C., has been appointed Recorder of the Borough of Southend.

Frederick Horace Lawton, Esq., Q.C., has been appointed Recorder of the City of Cambridge.

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1958

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Mechanical Aids to Evidence

By D. W. ELLIOTT, LL.B.
Lecturer in Law in the University of Manchester

Sir Hartley Shawcross, Q.C., M.P., at a recent meeting of the Bar Council, is reported to have given his opinion that the so-called " intercepts "—transcripts of recordings obtained by wire-tapping—which were used to give evidence before the Benchers of Lincoln's Inn in the *Marrinan* case, would have been admissible in a court of law. The purpose of this article is to consider this and other questions relating to what might be called mechanical aids to evidence, such as tape recordings, the possible use and abuse of which seem only recently to have attracted any widespread attention.

Mechanical aids fall into two broad classes. The first is where the apparatus is used in some way to obtain a measurement or reading out of court, and the result is given in court through the mouth of a witness who used it. The kinds of apparatus comprised in this head are almost infinitely various; common examples are microscopes, telescopes, stop-watches and speedometers, to which has been recently added radar. Here, of course, the effectiveness (*e.g.*, the magnification) or accuracy of the instrument must be proved, as well as the experimental conditions under which it was used; and it may be that the meaning of the reading or measurement has to be interpreted by an expert witness. But if these conditions are satisfied, the giving of evidence based on such instruments is unobjectionable and gives rise to no legal problems.

The second class, and the one with which we are concerned, is where the apparatus is used in court and " speaks to the court," in the sense that it purports to give an account, intelligible to the court, of events which have happened or words which have been spoken out of court. Now here, quite apart from technical questions as to the accuracy of the apparatus, the question arises whether, assuming that the machine's message is accurate, it is admissible anyway or excluded on the grounds of irrelevance, hearsay, etc. This question must be answered by asking if the same message in the mouth of the witness who produces the mechanical record would be admissible. Suppose, for instance, that a photograph is produced by X which purports to be a reconstruction of an event. Now if X did not himself witness the event, the photograph is as inadmissible as X's oral evidence would be if he purported to describe the event. But if X witnessed the event, the photograph is admissible whoever took it or whoever staged the reconstruction, for it is no more than if X, in the face of the court, drew a diagram or staged a demonstration of what he himself witnessed. *A fortiori*, if X, an eye- or ear-witness, in some mechanical way recorded the event as it happened, he is allowed to produce the record and say "That is what I saw or heard."

Photographs

The commonest case of such a mechanical record is the photograph, with which our courts have had a surprisingly long acquaintance. In 1862, photographs were admitted to show the configuration and general nature of the surface of a highway where the matter in question was nuisance by alleged obstruction of the highway,[1] and in 1864 a photograph was used to establish the identity of a person.[2] Since then photographs have many times been used to show such things as the *locus in quo* as seen by the producing witness, the position of vehicles or ships after a collision, as seen by the producing witness, the identity of a person or thing the appearance of which is known to the witness to whom the photograph is shown, the contents of a document which is lost or otherwise unavailable as remembered by the witness who produces the photograph.[3]

The important thing is that the witness who produces the photograph must be qualified by personal observation. In *R.* v. *Mitchell*[4] a surveyor prepared and produced a map or plan of the *locale* of an accident. He had personal knowledge of the locality, but none of the accident, so when it appeared that he had marked the plan with such expressions as "place where the can of milk was spilt," the plan was excluded as hearsay by Williams J. The same principle must apply to photographs and, *mutatis mutandis*, to sound recordings.

Of course, someone who has personal knowledge must testify as to the position of the camera, the light prevailing at the time, the filters used, etc., and if the true position of objects in the photograph in relation to other objects or their background can only be accurately deduced by one skilled in optics or applied mathematics, such expert evidence must be forthcoming.[5]

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[1] *R.* v. *United Kingdom Electric Telegraph Co.* (1862) 3 F. & F. 73.

[2] *R.* v. *Tolson* (1864) 4 F. & F. 103.

[3] See *Hindson* v. *Ashby* [1896] 2 Ch. 1, at p. 21; *In the Estate of Vines* [1910] P. 147; *M'Cullough* v. *Munn* [1908] 2 Ir.R. 194; *Lyons* v. *Chalmers* [1929] Ir.R. 674; *Re Stephens* (1874) L.R. 9 C.P. 187; *United States Shipping Board* v. *S.S. St. Albans* [1931] A.C. 632.

[4] (1852) 6 Cox 82.

[5] See the remarks of Lord Merriman in *United States Shipping Board* v. *S.S. St. Albans*, *supra*, at p. 642.

Motion pictures would appear to come under the same rules. No English authority has been traced, but to judge from the numerous examples quoted by Wigmore,[6] it seems to be almost common form in the United States for the defendant in an action for personal injuries to employ someone surreptitiously to film the plaintiff sawing wood, mowing his lawn, walking his dog, or otherwise engaged in physical activity. When the plaintiff enters the witness box, dragging his leg and supported by crutches, and testifies to his total or partial disability since the date of the accident, his evidence is most effectively rebutted by the defendant's witness's producing and playing over a moving picture of the plaintiff, say, getting the better of a fast set of tennis singles.

Theoretical objections to the admission of photographs

Some persons, while admitting the relevance of photographs in some cases, object to their admission in any case because of the ease with which the camera can be made to lie. It is indeed true that modern techniques, for example that of *montage*, are extremely effective. Nevertheless, as Wigmore has shown,[7] this criticism is misconceived. It overlooks the fact that if the camera can lie, so can witnesses. The photograph must be supported by the oath of some human being; and oaths can be broken. We do not reject the evidence of men on that score, or no evidence would ever be received. The old idea that evidence which is likely to be perjured must be excluded altogether was abandoned when statute allowed parties and their spouses to give evidence.[8] For a judge to exclude the evidence of a witness because he thinks he is lying would be to beg the very question which the jury has to decide. A photograph produced by a witness is the same in this respect as a story told by the witness—its genuineness is a matter for the jury. It is not for the opponent to seek its rejection by the judge by showing that it *might* be a forgery; rather should he seek, by cross-examination of the sponsoring witness or by rebutting evidence, to have it rejected by the jury because it *is* a forgery.

A more valid objection to such mechanical evidence as photographs is directed against what might be called the aura of infallibility which surrounds it. In Wigmore's words [9]:—

> "The peculiar danger and fallacy that lurks always in the use of writings and other materials of non-oral expression

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[6] 3rd ed., Vol. III, § 798a, n. 2.

[7] *Ibid.*, § 792.

[8] Evidence Act, 1851, s. 2; Evidence Amendment Act, 1853, s. 1.

[9] *Op. cit.*, § 790.

> . . . is that a material object, particularly a writing, when presented as purporting to be of a certain origin, always tends to impress the mind unconsciously, upon the bare sight of it, with the verity of its purport. . . . Does it purport to be a picture of the place of the murder? We look at it with an interest based on the unconscious assumption that it *is* that house. In short, we unwittingly give the document the credit of speaking for itself, though no human being has yet spoken for it. Now this tendency has to be rigorously suppressed. . . ."

And the method of suppressing it is, of course, to bear firmly in mind the fact that no-one has yet spoken for it. Until someone does, it is no evidence; when someone does, it cannot be more trustworthy or infallible than he, and cross-examination or other evidence may leave him looking anything but trustworthy or infallible. It cannot be *more* trustworthy or infallible than its sponsoring witness; but indeed it may be *less*, if doubt is thrown on the accuracy of the instrument or the efficacy of the method used in operating it.

Sound recordings

Aural aids to evidence, such as the tape-recorder, are not so well known to our courts,[10] but their novelty should not prevent their admission on principles almost exactly the same as those governing photographs.[11]

Thus, there must be some human witness who produces the recording and vouches for its accuracy. And whether or not the evidence given by the recording is inadmissible as hearsay will depend upon whether the same evidence in the mouth of the witness would be hearsay. If the recording is merely of what X (someone other than the sponsoring witness) said about the facts in issue, such is obviously inadmissible as hearsay; but if what X said is one of the facts in issue (*e.g.*, if X is accused of uttering seditious words, or of conspiring with another person and the conspiracy is alleged to be in a conversation with that other person) then, just as the sponsoring witness is enabled to prove what X said by saying what he heard X say, so he is able to prove it by producing and playing over a recording of the conversation. The same position obtains where the witness is allowed to say what X said, not because X's words are a fact in issue, but because evidence of X's words is admissible as an exception to the hearsay rule, as where they amount to an admission or confession by X.

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[10] For an early example of the use of recordings, see *Harry Parker* v. *Mason* [1940] 2 K.B. 590, where a recording machine "notwithstanding the strain imposed by Mr. Parker's epithets" (MacKinnon L.J., at p. 599), faithfully recorded an acrimonious conversation between bookmaker and punter, and was put in evidence. It is not clear whether the recording was admitted by agreement, although from the extreme personal hostility which apparently existed between the parties, one may, perhaps, surmise that neither would waive any evidential rule in favour of the other.

[11] In a few cases, mostly in inferior courts, the admissibility of sound recordings has been considered; see this *Review* [1954] p. 4; [1955] p. 2, [1956] p. 42; [1957] p. 709.

In the same way as the accuracy, position, etc., of a camera must be vouched for by someone having personal knowledge, so must the position, strength and accuracy of the recording apparatus, and the identity of the owner of the recorded voice be established by evidence. The identity of the owner of the voice will, in cases where the voice has no strong peculiarities which permit of the court making a comparison with the voice of some person speaking in its presence, have to be proved by circumstantial evidence. This could be done by proving that X was seen to utter the recorded words standing within the proved range of a microphone proved to be in a certain position, and proving that the microphone was in fact connected with the recording apparatus now produced. This would require the court to take judicial notice (or else to hear expert evidence) of the fact that sounds made within the range of the microphone are transmitted through, and accurately reproduced by, the apparatus, and to draw the inference that the voice heard in the courtroom is that of X.

In a case in which there is no suggestion of deliberate forgery, the fidelity of the machine will not usually be in question, since no ordinary degree of inaccuracy will falsify what a man says in plain words. But it will be otherwise in cases where the *volume* of sound made on a particular occasion is material, as in prosecutions or actions for nuisance by noise. Then the accuracy of the machine in reproducing the volume will have to be established and that will be difficult, involving as it does such considerations as the acoustic properties of both the room or place where the recording was made and the courtroom where it is played back, and the method of compensating for any difference between the two.[12] It is conceived that readily recognisable extraneous sounds picked up by the recording, such as the footsteps of a passer-by, might provide the court with a useful yardstick, but in the absence of such, or of extremely complicated and expensive technical evidence, it would seem that the evidence of a recording is at its most unsatisfactory in this sort of case. Nevertheless, it has been admitted in nuisance cases in the United States,[13] and in at least one case, in a magistrate's court, in England.[14]

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[12] On the technical problems involved, see Beranek, *Acoustics* (McGraw-Hill Book Co., Inc.), Chap. 12—" Acoustic Measurements " ; J. McClaren, " What is a Decibel? " (1957) 101 S.J. 859 ; B.S. 1479 : 1948—" The Use of Sound Level Meters " ; " Loudness," *Wireless World* (1957), p. 529 (November).

Theoretical objections to the admission of sound recordings

As has been shown in an article in this Review,[15] the possibility of forgery of sound recordings, especially tape recordings, is a real one.[16] Nevertheless, it is suggested that this is no more an objection to the reception of such recordings in evidence than it is in respect of photographs or documentary evidence. An article like that of Mr. Radley's is as much a manual for counsel cross-examining the forger of a recording as it is for the forger himself. It may also be admitted that the aura of infallibility is even more noticeable with sound recordings than with photographs and other documentary evidence, but this can and must be countered by concentrating on the human witness who produces the recording, rather than the recording itself.

There remains the objection that in many cases such evidence may have been illegally obtained. This, of course, is no ground for excluding it in cases where it has *not* been illegally obtained, and in this connection it must be remembered that " unsporting " conduct such as breaking confidences[17] or eavesdropping, is not usually illegal. In cases where illegality is present, the following observations may be made.

(1) If the person whose statement is recorded is in the custody of the police, it might sometimes be argued that the judges' rules have been infringed. For instance, if two suspects in custody are left alone together and a recording is clandestinely made of their conversation which they think is not overheard, it might be argued that this is an infringement of the rules if they have not been cautioned that anything they say will be recorded and given in evidence. If that argument were upheld, the recording might be excluded as being of an involuntary confession. However, it must

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[13] *Loring* v. *Boston Elevated Railroad Co.*; *Boyne C. G. & A. R. Co.* v. *Anderson*, cited Wigmore, *op. cit.*, § 795a, n. 4.

[14] *Police* v. *Chapple* (1956) 126 J.P.Jo. 493. On a summons for failing to abate a nuisance caused by the crowing of cockerels, the prosecution proposed to play a tape recording made at 4.45 a.m. Defence objected that no one could tell what the actual volume of sound was, but on an assurance being given that the volume had not been increased, the magistrates admitted the recording, and convicted.

[15] By Mr. T. B. Radley, at [1954] Crim.L.R. 96.

[16] Already at least one case of possible tampering with a recording made for evidential purposes has come to light: see [1955] Crim.L.R. 2.

[17] *e.g.*, by recording a confidential conversation.

be remembered that the judges' rules are not rules of law,[18] and notwithstanding an infringement, the judge may admit the statement if it appears to him to be voluntary. Nor can it be denied that the very fact that the prisoner did not know he was being overheard can be turned against him as showing that the statement was truly voluntary.

(2) The recording may have been obtained by tapping telephone wires. As has been shown,[19] if this be done under warrant of a Secretary of State, it is not illegal. In other cases, where there is no warrant, or where the telephone system is a private internal one, a trespass may be involved, so that the recording might be said to have been obtained by illegal means. That this would be no objection to its admissibility is made clear by *Kuruma* v. *R.*,[20] where the Privy Council laid down that the test to be applied to discover whether evidence is admissible is, Is it relevant ?: " If it is, it is admissible, and the court is not concerned with how the evidence was obtained." [21] It was, however, allowed by Lord Goddard C.J. that in a criminal case if the evidence had been obtained " by a trick," the judge might have a discretion to rule it out.[22] Now *Kuruma* v. *R.* was concerned with evidence obtained by an illegal search where there was no element of trickery, so that an attempt might be made to argue that in a case where evidence is obtained from a man by fraudulently letting him believe that no record was being taken, there would be sufficient trickery to make the case distinguishable from *Kuruma* v. *R.* It must be said, however, that the whole course of English authority is highly inauspicious for the success of such an argument; Crampton J.'s uncompromising dictum,[23] " It matters not how you get it—if you steal it even, it would be admissible," was repeated with approval by Lord Goddard in *Kuruma* v. *R.*[24]

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[18] *R.* v. *Voisin* [1918] 1 K.B. 531; *R.* v. *Bass* [1953] 1 Q.B. 680.

[19] See [1957] Crim.L.R. 502 *et seq.*

[20] [1955] A.C. 197; [1955] Crim.L.R. 184; and see *R.* v. *Warwickshall* (1789) 1 Leach 263; *R.* v. *Leatham* (1861) 8 Cox 498; *Elias* v. *Pasmore* [1934] 2 K.B. 164.

[21] *Per* Lord Goddard C.J. in *Kuruma* v. *R.*, *supra*, at p. 204.

[22] *Ibid.*, at p. 204.

[23] In *R.* v. *Leatham*, *supra*, at p. 501.

[24] *Supra*, at p. 203. The whole question of the admissibility of evidence obtained by wire-tapping has been much canvassed in the United States; see *Olmstead* v. *U.S.* (1928) 277 U.S. 438; *Nardone* v. *U.S.* (1) (1937) 302 U.S. 379; *Weiss* v. *U.S.* (1939) 308 U.S. 321; *Nardone* v. *U.S.* (2) (1939) 308 U.S. 338; but that controversy revolves round certain constitutional provisions which have no relevance in England. Constitutional considerations apart, the rule in the United States seems to be similar to that enunciated in *Kuruma* v. *R.*—see the majority judgments in *Olmstead* v. *U.S.*, *supra*.

In this connection, it may be remembered that in criminal cases, there is a general rule of practice, quite distinct from the rules governing the admission of evidence, by which the trial judge has a discretion to reject any evidence which seems unfair, since it is his duty to set the essentials of justice above any technical rule of evidence, if the strict application of the latter would operate unfairly against the accused.[25] Now this really has no relevance to the objection that wire-tapping is illegal, and relates to a quite separate and distinct objection which could be levelled against all evidence by sound-recording. Before this rule of practice could be invoked in the prisoner's favour, it would have to appear that the *effect* of admitting evidence would be likely to be unfair, in that the prejudicial effect of the evidence would be likely to be out of all proportion to its probative force. Any unfairness or trickiness in the obtaining of the evidence would be wholly irrelevant to this question; but if such prejudicial tendency did appear, then the evidence would be rejected whether it had been obtained by wire-tapping or not.

Other considerations: (1) Absence of any human eye- or ear-witness

Suppose that X, suspecting that someone is pilfering from his cupboard, sets a trap in the form of a camera so rigged that it will photograph anyone opening the cupboard. The camera photographs A in the act of removing something from the cupboard,[26] and at A's trial for larceny, X tenders this photograph as proof of the fact of A's putting his hand into the cupboard. X is prepared to prove the position and accuracy of the camera and the way it was rigged, but no witness can be found to say that he saw what the camera saw. Is the photograph admissible?

It was suggested earlier in this article that an instrument's message is admissible only if the same message in the mouth of its sponsoring witness would be admissible. This requirement would seem at first sight to rule out the photograph in our example. This is because X cannot tell the court that he himself saw A, because that is untrue; nor can he say that the camera told of A's presence. Therefore, since X's tale of A's presence is inadmissible, so is that of the photograph.

The fallacy in this argument lies in the assumption that X's evidence is excluded by the rule against hearsay. X is not like the surveyor in *Mitchell*,[27] who got some of his information from a third person and so was not qualified by personal observation. X's observation is as direct and personal as the nature of the case will permit. The reason why the court will not listen to X when he tells it of what a photograph, or a document or a recording says, is that better evidence is at hand in the form of the actual photograph, document or recording.[28] That X's evidence is not inevitably inadmissible is shown by the circumstance that the best-evidence rule has no application if the "better evidence," *i.e.*, the photograph, is not forthcoming and is satisfactorily accounted for. So if X proves that the photograph of A has been accidently destroyed, he must be allowed to give evidence of what the photograph said. The corollary of that is that, if the photograph is *not* destroyed, it speaks instead of X, and the only result of X's failure to see the actual event himself is that the evidence of the photograph cannot be *corroborated* by the direct personal observation of any human being. There is no rule that what Wigmore calls "writings and other materials of non-oral expression" must be corroborated by independent human testimony; they must be vouched for by or identified with the credit of a human witness, but that is a different thing.

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[25] See the remarks of Viscount Simon in *Harris* v. *D. P. P.* [1952] A.C. 694, at p. 707.

[26] This device was successfully used by the National Physical Laboratory at Teddington to catch an employee in the act of stealing mercury—see [1957] Crim.L.R. 708.

(2) *Transcripts*

The best-evidence rule should exclude the use of transcripts of a recording except (a) in order to assist the court to follow the recording as it is played in court, or (b) where the original recording's absence is satisfactorily accounted for. Whether or not the original's absence is satisfactorily accounted for, if the transcript is not put in by someone having personal knowledge of the recording's contents, it should be excluded as hearsay. But if the transcript is automatically made without the intervention of any person (as in teleprinting), then the transcript is itself a mechanical recording and is admissible provided that its accuracy is proved and its genuineness vouched for by a human witness.

Unless the intercepts referred to by Sir Hartley Shawcross[29] are purely mechanical records of a sound-recording, it is difficult to see how they could be admissible in evidence in a court. It is true that any illegality in their origin (*e.g.*, an improper communication to a third party by one authorised to indulge in wire-tapping by Secretary of State's warrant) will not affect their admissibility; and the hearsay rule could be circumvented by having them produced by a witness with personal knowledge of the contents of the recording. But the best-evidence rule remains an apparently insuperable barrier—the transcript is only secondary evidence of the contents of the recording. If the absence of the original is accounted for by the fact that Crown privilege has been claimed for it, that privilege would make secondary evidence of the recording's contents equally inadmissible.[30]

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[27] *Supra.*

[28] The "best evidence" rule is, of course, limited to documents, but it is submitted that both a photograph and a sound-recording are documents for this purpose. See *Buxton* v. *Cumming* (1927) 71 S.J. 232; and Glanville Williams, "What is a Document?" (1948) 11 M.L.R. 150.

[29] From the remarks of the Home Secretary on the subject it would seem that Post Office employees, under warrant, made recordings of telephone conversations, and from them prepared transcripts which they passed on to the police, who in turn passed them on to the Secretary of the Bar Council: H.C. Debates, June 6, 7, and 27, 1957.

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[30] *Chatterton* v. *Secretary of State for India* [1895] 2 Q.B. 189, at pp. 193–198.

Malice Implied and Constructive[1]

By J. W. Cecil Turner

In the Homicide Bill as published in November 1956 the explanatory memorandum announced that clause 1 of the Bill provided for the abolition of the doctrine of constructive malice; and in the margin of the text opposite clause 1 (1) the words "Abolition of 'Constructive malice'" were printed. These words recur in the margin of the Homicide Act, 1957, section 1 (1) which, repeating exactly the words of clause 1 (1) of the Bill, reads:

> "1.—(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

It is, of course, well known that marginal notes are not to be read as part of the enactment, but the fact remains that it was understood on all sides that the doctrine of "constructive malice" was to be abolished and it was supposed that those who drafted the Bill and those who supported it intended to effect that abolition. It therefore caused surprise to many people to see that the text of the clause, now reproduced as section 1 (1), should contain words which seem plainly to mean that "malice aforethought implied" was to be, and has been, retained; for it had for very many years been believed by most lawyers that "implied malice" and "constructive malice" were alternative terms for the same legal concept. ✓ Was there any true basis for that belief? No explanation of what, if any, difference there is between the terms is to be found in the Act, nor was anything comprehensible stated on this question in the course of the debates in either House of Parliament.

If we turn to the history of the law we find that Lambard used neither of the above terms, but wrote[2] "Many times the law doth by the sequel judge of that malice which lurked before within the party, and doth accordingly make imputation of it." The examples[3] which he gives of such imputation are, he says, because " the law presupposeth that he carrieth that malicious mind with him that he will achieve his purpose though it be with the death of him against whom it is directed." This plainly treats the question as one of evidence by which subjective intention can be established. Lambard's abstract principle of evidence was however not carried out by him through any scientific analysis. Coke's treatment of the topic was vigorously criticised by Stephen [4] but he does use the phrase " malice implied by law " in the case of the man who has killed an officer of the law who was " doing or offering to do his office." [5] Coke ran into confusion when discussing provocation but this does not concern our present point as to the meaning of " implied malice." (This term was in fact not used by Coke to cover the case of a killing in the course of the commission of an unlawful act, although with no intention to kill which he held to be murder.[6]) Hale used the term " presumed malice " in regard to the killing of an officer of justice,[7] and later headed a chapter [8] " Concerning murder by malice implied *presumptive*, or malice in law." Under this rubric he discussed three situations, I " Voluntarily " killing without provocation (for example by poisoning), II Malice implied when a minister of justice (bailiff, constable or watchman, etc.) is killed in the execution of his office, III Malice implied in relation to the person killing, the examples being a killing in the course of a robbery, of poaching game, of ill-treatment of a prisoner by a gaoler, or by an unlawful method of execution. Foster grouped together all the instances of implied malice.[9] Hawkins speaks [10] of

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[1] This article is based on a section of the forthcoming 11th edition of Russell on *Crime*.

[2] *Eirenarcha*, Book 2, p. 239 (misprinted as 205).

[3] A "sudden stabbing" without any outward show of present quarrel; the killing of "a known officer or one that had and showed a sufficient warrant to arrest him for debt only"; a killing by beating a man to disseize him.

> " Murder . . . such as happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who is slain, in which case the malice seems to be most properly said to be implied."

Blackstone [11] wrote " Also in many cases where no malice is expressed, the law will imply it." [12] East, following Foster, wrote [13]

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[4] 3 H.C.L. 52 *et seq.*

[5] 3 Inst. 52.

[6] 3 Inst. 56. This doctrine was, by the time of Foster, narrowed to a killing in the course of the commission of a felony.

[7] 1 P.C. 451.

[8] Chap. 38, p. 455.

[9] C.C. and C.L. 257. " Most, if not all the cases which in our books are ranged under the head of *Implied Malice* will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief."

[10] 1 P.C. c. 31, s. 19.

[11] 4 Comm. 200.

[12] Giving the traditional examples of poisoning, killing an officer of justice, killing unintentionally but in the course of doing another felony.

[13] 1 P.C. 215.

"And therefore malice is implied from any deliberate cruel act against another, however sudden." [14] From the statements of all these old authorities there can, it is submitted, be seen traces of a conception (although not expressed) common to all, namely, that each is looking to the general facts of the particular case to find evidence of that subjective attitude of mind in the accused person, which, according to the views of his day, constituted "malice." And, it should be noted, the writers speak of "implied malice" and *not* of "implied malice aforethought" [15]; thus there can be no doubt but that at all periods what is implied, *i.e.*, the legal fiction, relates to the substantive "malice" (*malitia*), and not merely to the adjective "aforethought" (*praecogitata*).

To take one example, all of them, from Coke onwards, considered it necessary that the prisoner should have knowledge, by notice or otherwise, that it was an "officer of justice" to whom he was making a violent resistance. None of them however speaks of "constructive malice" [16]; this is a term which has gradually established itself in more modern times,[17] and has been universally regarded as synonymous with "implied malice." [18]

The interpretation, therefore, of section 1 of the Homicide Act by the courts was awaited with interest. The section clearly purports to remove from the category of murder *some* cases of killing "in the course or furtherance of some other offence" (subs. (1)) and "in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody" (subs. (2)). These are exactly within what always used to be described as "killing with malice implied." And yet the section retains as murder the cases of killing "with malice aforethought (express or implied)."

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[14] His examples include:—killing an officer of justice; killing a private person who is lawfully interfering to prevent a breach of the peace; killing in prosecution of some other felony; where it happens from other unlawful acts of which death was the probable consequence . . . though the death ensue against or beside the original intention of the party.

[15] See Stephen, *Digest of the Criminal Law*, Appendix, Note VIII.

[16] It was not used by the Commissioners in their Report of 1839; but it appears as synonymous with "implied malice" in the judgment in *R.* v. *Greenwood* (1857) 7 Cox 404, and the expression "constructive murder" and "constructive homicide" occur in *R.* v. *Vamplew* (1862) 3 F. & F. 520, and *R.* v. *Skeet* (1866) 4 F. & F. 931.

[17] Perhaps as a result of the forced and artificial interpretation of certain statutes (such as the Statute of Treasons of Edward III, by which "constructive treasons" were created by the judges).

[18] For example, no differentiation of meaning between these two expressions is noted in the Report of the Royal Commission on Capital Punishment 1949–1953, Cmd. 8932.

From the coming into force of this Act, therefore, it was to be expected that some new definition of "implied malice" would have to be found. It was of course possible that the courts might seek to find it in the statement which has been made in a number of cases that it is murder if a death is caused even without any intention to kill[19] (*i.e.*, without "express malice"), but with the intention of causing grievous bodily harm, so that this latter would constitute "implied malice." This indeed seems to have been the doctrine which the Court of Criminal Appeal sought to enunciate in *R.* v. *Vickers*.[20] That being so the same difficulties are now to be encountered after the Homicide Act as had been experienced before it. But there is now one further point to be noted. If a man takes action against another with intent to do him grievous bodily harm, he has engaged upon the offence (a felony) covered by section 18 of the Offences against the Person Act, 1861. Supposing therefore, upon a charge of murder, that the jury are not satisfied that the prisoner intended to kill but are satisfied that he did intend to do grievous bodily harm,[21] that would be a finding that he had caused the death "in the course or furtherance of another offence." In that position the man, by virtue of section 1 (1) of the Homicide Act, will not be guilty of murder unless he killed with the same malice aforethought (express or implied) as is required for the killing to amount to murder when not done in the course of . . . another offence. It would be an illogical absurdity to accept an intent to cause grievous bodily harm as "implied malice," and therefore to read the statute as tantamount to stating "to kill when the intent is to cause grievous bodily harm will be murder if the deceased was killed with intent to cause grievous bodily harm." Now we are told in an article "Appeals to the House of Lords"[22] that an argument framed on these lines which was advanced by counsel in *R.* v. *Vickers*[23] was disposed of "with devastating effect" by the short answer: "causing grievous bodily harm is not in these circumstances 'some other' offence than the killing; it is part of the killing."[24] This answer is, of course, a simple *petitio principii*, since it is precisely "in these circumstances" that the question to be answered arises; there can be no doubt, of course, that if a *petitio principii* is admitted, its effect is always devastating.

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[19] See the words "inflicted or attempted to inflict grievous bodily harm . . . or used force . . ." which occur in section 5 (2) of the Act.

[20] [1957] 3 W.L.R. 326.

[21] See *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141 "the necessity is to prove malice aforethought which is supplied in law by proving intent to do grievous bodily harm," *per* Lord Goddard C.J., at p. 146.

[22] [1957] Crim.L.R. 566, at p. 575.

[23] [1957] 3 W.L.R. 326.

[24] In the article itself this answer is stated to have been made by Slade J. No reference for the citation is given and it cannot be found in any of the reports so far published. Without knowledge of its context, therefore, it would be improper to attribute to the learned judge the illogicality which is apparent from the context in which the author of the article employs it.

Therefore, in order to make sense of section 1 (1) it would seem that some other meaning than "intent to cause grievous bodily harm" must be found for "malice aforethought . . . implied." It is here suggested that when the history of the term "implied malice" is examined it will be found that the only sensible interpretation of the section is to read the words as meaning the subjective attitude of mind in the prisoner revealed by evidence that *when acting as he did act he realised that he was endangering the other man's life*, in other words, that he consciously took the risk of killing the man. However, before any development of this proposition it is necessary to examine the words "grievous bodily harm."

Grievous bodily harm

It is unfortunate that the acceptance of a definition of the mental element in the crime of murder which would be easy both to state and to apply has been impeded by the use in judgments and in text-books of the vague words "grievous bodily harm." This expression occurred in the statutes of 1803 and 1828 [25] (both repealed) which dealt with injuries to the person, and is now found in six of the sections of the Offences against the Person Act, 1861,[26] (and in section 5 (2) of the Homicide Act, 1957,[27]) but in none of these has it been defined. The courts, in the decided cases, have laid it down, for the purposes of these statutes, that the bodily harm may be internal or external, that it need not be permanent nor dangerous but that it is not "grievous" unless it seriously interferes with health or comfort,[28] although only for a limited period of time, and although life is not endangered.[29] But it is significant that the statutory provisions mentioned above impose a subjective test of liability by laying down a higher maximum penalty for the cases where the harm is intended.[30]

Although in discussing the crime of murder many judges and writers have included within their conception of malice aforethought an "intention to do grievous bodily harm" the exact meaning which they attribute to the words has not been made clear. There seemed indeed to be no judicial authority for giving to this expression, for the purpose of defining murder, all or any of the meanings which have been given to it by the courts for the purpose of defining the non-fatal crimes in the Offences against the Person Act, 1861. On the other hand, it would be a strange legal situation if one and the same injury must be called a "grievous bodily harm" if death does not result, whereas if it does prove fatal, then it may not be so called.

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[25] 43 Geo. 3, c. 58 and 9 Geo. 4, c. 31.

[26] ss. 18, 20, 23, 28, 29, 31.

[27] In this instance with the addition "or himself used force."

[28] See *R.* v. *Ashman* (1858) 1 F. & F. 88, *per* Wilkes J.

[29] *R.* v. *Cox* (1818) R. & R. 362.

[30] In s. 28 the word "maliciously" qualifies the phrase "or do any grievous bodily harm."

The truth of the matter, it is submitted, is as follows. When a careful examination is made of the declarations in which the words "grievous bodily harm" occur there will be found again and again the same defect, namely, that *the evidence going to establish facts to which a legal principle will apply is confused with the definition of that principle itself.*[31] And this is coupled with the tendency to yield to the attractions of the objective test of liability while at the same time expressing the subjective test. So that, in this connection, the word "grievous" lacks definition, and like the word "violent" has no more than an emotional significance, and is equally valueless as a test of criminal liability. The resulting pattern of thought can be seen in many passages in the Report and Minutes of Evidence of the Royal Commission of 1953. Thus, one and the same witness is recorded as making the following statements:—

> "If a man inflicts grievous bodily injury on another he must know that death is likely to be caused thereby."
>
> (Ev. p. 246, line 4.)
>
> "I should like to see constructive malice abolished."
>
> (Ev. p. 248, Q. 3115.)
>
> "If a person, in the course of committing a felony, commits an

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[31] The fallacy of confusing evidence with law was put with force and clarity by the Royal Commission appointed in 1834, who, in their Report of 1839 ([168]–XIX–235), stated (at p. xxiii):

> "the conclusion of Mr. Justice Foster supplies no certain boundary for distinguishing the crime of murder. . . . It is a description of that which is rather a matter of fact than of law; it may be inferred . . . that the common law afforded no certain test of that malice which was essential to the crime of murder. . . . We proceed to offer some observations . . . with a view to show that in the ordinary case where death is occasioned by the doing of an act attended with manifest peril to life, the conclusion is properly one not of law but of fact, and that it is for the jury to decide whether the offender wilfully exposed life to manifest peril. Upon their affirming or negativing this proposition, the question whether he be guilty or not of murder, ought, we think, to depend. The "*mens mala*"—the heart regardless of social duty—are figurative expressions to denote the criminal apathy or indifference with which an act is wilfully done which puts human life in peril. Whether such a peril be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it was done, the probability that the act under these circumstances would be fatal to life, and the consciousness on the part of the offenders that such peril would ensue."

> act of violence, then from every point of view that is murder, because if a person inflicts grievous bodily harm on another person and death results, that is murder and must necessarily be murder."
>
> (Ev. p. 249, Q. 3127, line 21.)

In answer to the question—

> "Supposing the burgler trips up the householder who is trying to arrest him and the householder is killed, accidentally so to speak?"
>
> ". . . I should not say that would be murder, because there he is not offering real violence to the man, . . . he is doing something which in the ordinary course no one would anticipate would cause grievous bodily harm."
>
> (Ev. p. 249, Q. 3131.)
>
> "I should be sorry to see it go out that if a man does something which he knows or ought to know would cause grievous bodily harm, it would be open to him to say 'Oh yes, I only meant to cause grievous bodily harm; I did not mean to cause death.'"
>
> (Ev. p. 252, Q. 3163.)
>
> "Generally speaking, if violence is committed during the course of the commission of the felony and death results, that is murder, quite apart from the fact that a felony was being committed. It is the violence which supplies the malice. I think anyone agrees . . . that it would be just as well to limit implied malice to cases in which the felony was one involving violence, highway robbery, or rape, and, of course, attacking a householder in the course of housebreaking."
>
> (Ev. p. 249, Q. 3127.)
>
> *Next question.* "Cases where the felony was one involving violence and also where the act was intended to do grievous bodily harm?" *Ans.* "Yes."
>
> (Ev. p. 249, Q. 3128.)
>
> *Q.* "Am I right in saying that these references to violence come to no more than saying 'Such use of force as a man using it realises may endanger life'?" *A.* "Yes, knew or ought to have known."
>
> (Ev. p. 252, Q. 3180.)
>
> *Q.* "Then would it not be less confusing to the jury to direct them in accordance with clause 174 (*b*)[32]: 'Any bodily injury which is known to the offender to be likely to cause death,' which you said would seem to cover clause 175 (*a*)?" *A.* "Yes."
>
> (Ev. p. 252, Q. 3171.)
>
> *Q.* "Article 174 (*b*) would cover all those cases, would it not?" *A.* "I think it would."
>
> (Ev. p. 252, Q. 3172.)

From the above it will be seen that the witness finally came to a conclusion which fully accepted the subjective test of liability, a test which was recognised as the proper test by the Commissioners of 1839 and again in the Criminal Code Bill Commission Report of 1879, the former of which declared "It is the *wilful exposure* of life to peril that constitutes the crime,"[33] while the latter[34] re-inforced this. These two passages constitute a clear support for the principle that malice aforethought should be defined so as to require proof that the person accused of murder had realised that he was imperilling human life. Unless he had this forethought of *fatal* consequences he ought not to be found guilty of murder. That the courts are well aware that in pronouncing the doctrine of "intention to cause grievous bodily harm" they are excluding the subjective element of foresight of death is made plain by taking one clear example.

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[32] Of the Draft Code of 1879.

In *R.* v. *Whybrow*[35] the Lord Chief Justice said[36]:

> "In murder the jury is told—and it has always been the law—that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, in such a way that an ordinary reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law . . . is illogical. . . . It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought which is supplied in law by proving intent to do grievous bodily harm."

The words "an ordinary reasonable man must know" are ambiguous, like the phrase "must he, as a reasonable man, have contemplated"[37]; for standing alone each is equally capable of being read as laying down either an objective test or a subjective one. It might, therefore, by a stretch of imagination, be possible to discern in the remark "an ordinary, reasonable person must know that at least grievous bodily harm will result" a certain leaning towards treating the doctrine as one of evidence (tending to show what was in the mind of the prisoner when he made the attack); yet the emphasis in the whole passage is directed to the point that a declaration of law is being made, in the form in which it should be put to the jury. That the jury, and even the Court of Criminal Appeal itself, does not, under the terms of such a direction as this, regard it as an aid in assessing the evidence, but as a rule of law is shown by such cases as *R.* v. *Grant and Gilbert* and *R.* v. *Ward.*[38]

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[33] 1839 [168]–XIX–235, pp. xx–xxiv.

[34] Report of 1879, p. 24.

[35] (1951) 35 Cr.App.R. 141.

[36] At p. 146.

[37] In *R.* v. *Lumley* (1911) 22 Cox 635.

We may now turn to the judgment of the five judges of the Court of Criminal Appeal in *R.* v. *Vickers.*[39]

> "In this case the appellant had been convicted of capital murder. He had broken into a shop with intent to steal, knowing that an elderly woman lived in the upper storey, but not expecting to be disturbed since she was deaf. She did, in fact, come downstairs and when she approached him he struck her several blows and although the medical evidence was that her injuries could have been the result of a moderate degree of violence, she died as the result of the attack. The jury appear to have accepted the evidence from some witness that she had been kicked in the face but this the prisoner denied and argued that he had no intention of killing her or of causing her serious injury."

The jury guided by the direction of the judge, Hinchcliffe J., found the prisoner guilty of capital murder. His appeal to the Court of Criminal Appeal was heard by three judges but as there was not complete unanimity between them the Lord Chief Justice assembled a full court of five members who at the second hearing agreed in dismissing the appeal. Counsel for the appellant took, substantially, the point that a person who kills by acts done with intent to commit grievous bodily harm kills "in the course or furtherance of some other offence," namely, the felony under section 18 of the Offences against the Person Act, 1861, and therefore, by virtue of the opening words of section 1 of the Homicide Act, was not liable to be convicted of murder unless he knew that his acts were likely to cause death. This argument was rejected, and the Lord Chief Justice delivered a judgment which must now be carefully examined. After reading section 1 (1) of the Act, his Lordship said[40]:

> "'Constructive malice' is an expression which I do not think will be found in any particular decision[41] but it is to be found in the textbooks, and is something different from implied malice. The

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[38] (1954) 38 Cr.App.R. 107 and [1956] 1 Q.B. 351.
[39] [1957] 3 W.L.R. 326.
[40] [1957] 3 W.L.R. at p. 328.
[41] But see *ante*, n. 16.

> expression ‘constructive malice’ is generally used where a person causes death during the course of carrying out a felony which involves violence—that always amounted to murder.[42] . . . Another illustration of ‘constructive malice’ would be if a man raped a woman, and she died in the course of the struggle. The fact that he may only have used a moderate or even small degree of violence in the struggle would have been no defence to a charge of murder. . . . Another instance of constructive malice which was always held sufficient to amount to murder was . . . if a person was resisting arrest before the Act of 1957 and caused the death of a police officer, although he might only have used a little violence on the officer he was guilty of murder. . . . Malice aforethought is a term of art. It has always been defined in English law as, either an express intention to kill . . . or implied,[43] where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victim died as the result. If a person does an act which amounts to the infliction of grievous bodily harm he cannot say that he only intended to cause a certain degree of harm. It is called *malum in se* in the old cases and he must take the consequences."

These last two sentences invite serious consideration especially since his Lordship had previously stated that the court was about to deliver a decision which will be a guidance to courts in the future; it is, moreover, a decision on which the life of the prisoner, Vickers, depended and upon which other lives may well depend henceforth. The first of the two sentences in plain words eliminates any subjective mental element from the test of liability in the crime of murder; it makes the crime one of strict liability, so that the prosecution need do no more than prove the killing (the *actus reus*); for surely to kill a man is to inflict the maximum amount of grievous bodily harm that is possible. The statement also conflicts with the earlier dicta in the judgment relating to "a moderate or even small degree of violence in the struggle." In the second sentence the point of the allusion to *malum in se* is difficult to appreciate. According to Blackstone[44] it is a generic expression, a classificatory rubric covering offences against "those rights which God and nature have established"[45]; for Blackstone and for other jurists who have employed it, it did not primarily indicate any of the essential elements of liability to conviction for the commission of one of those specially serious offences. Since, however, the expression was a vague one it seems to have been commonly accepted that every common law felony would be a *malum in se*. Accordingly, the old doctrine that a killing effected in prosecution of any felony was murder could be and was sometimes discussed under such a heading as " Death ensuing collaterally from an act *malum in se* " ; but when the text is examined, it can be seen that it is the " felonious intent " which constitutes the element of liability.[46] The judgment in *Vickers*' case having already declared that the Act has abolished the " constructive " malice of the simple felonious intent, the above words " and he must take the consequences " would be a *non-sequitur* if they were intended to follow from the alleged fact that the offence actually committed (but not intended) happened, in the ancient writings, to be called *malum in se*. The purpose of the two sentences in question becomes still more difficult to appreciate when the judgment continues:

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[42] It may be interjected that the word "violence" was first imported into a judgment by Lord Birkenhead in *D. P. P.* v. *Beard* [1920] A.C. 479; it is not found in Hale, Foster or Blackstone as an element in the definition of murder, but seems to have originated in a suggestion propounded by the late Professor Kenny: see *Modern Approach to Criminal Law*, pp. 253, 254.

[43] In order to satisfy the syntax of the sentence his Lordship must be supposed to have meant "or an implied intention to kill, where, etc."

[44] Comm. 1 (ed. 1830), pp. 42, 53 *et seq.*

[45] "Such as murder, theft, and perjury." *ibid.*, p. 54.

> " If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, and was at the time the Act was passed, sufficient to imply the malice aforethought which is a necessary constituent of murder."

This passage reinstates the subjective requirement of intent to commit grievous bodily harm which the preceding one had seemed to exclude. Secondly, the statement that grievous bodily harm doctrine " has always been held in English law . . . sufficient to imply the malice aforethought " is not, in terms, correct so far as the ancient writers are concerned.[47] Next comes a categorical statement not based upon any argument:

> " It will be observed that the section preserves implied malice as well as express malice, and the words ' where a person kills another in the course or furtherance of some other offence ' cannot, in our opinion, be referred to the infliction of grievous bodily harm if the case which is made against the accused is that he killed a person by having assaulted the person with intent to do grievous bodily harm, and from the bodily harm which he inflicted that person dies. The ' furtherance of some other offence ' must refer to the offence he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it."

It is with the greatest respect submitted that there is here an undetected ambiguity in the word " killing." Killing is not per se an offence at all ; as it stands the word only indicates the *actus reus* of the offence of murder; for that crime of felonious homicide there must in addition be the mental element, the malice aforethought, (even if it be only " implied "). By definition adopted by the court itself, the " intent to do grievous bodily harm " implies the malice aforethought, the necessary mental element, which the Act requires if the killing is to constitute the offence of murder. It is surely impossible to say that an assault with intent to do grievous bodily harm is not a felony under section 18 of the Act of 1861, and that it is not another offence than murder. Since then the Homicide Act states that a killing when done in furtherance of another offence shall not be murder unless done with implied malice it would certainly make nonsense to choose as the meaning of " implied malice " some other offence, namely, an assault with intent to do grievous bodily harm. But where is the necessity to make that choice? And, having made it, to seek to avoid the consequence of it by an arbitrary statement to the effect that it is only *some* other offences that can be within the plain words of the Statute and not this particular offence? It is easy to see that a killing effected in the course of a burglary is also a killing effected in furtherance of the felony intended to be committed in the dwelling-house by the burglar, *e.g.*, stealing, or rape. If in this series the felony of grievous bodily harm be in fact inserted why must that offence be, as it were, merged and consumed in the killing, and not the other offences in the series? The only reason offered for this method of dealing with the problem of interpretation seems to lie in the next two sentences of the judgment following immediately upon the one cited above (which ends with the words " there would be no sense in it "). These read as follows:—

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[46] See East 1 P.C. ch. V, s. 31.

[47] See Stephen, 3 H.C.L. pp. 56 *et seq.*

> " It was always the English law, as I have said, that if death was caused by a person in the course of committing a felony involving violence, that was murder. Therefore, in the present case it is perfectly clear that the words ' where a person kills another in the course or furtherance of some other offence ' must be attributed to the burglary he was committing."

Earlier in the judgment, it had been plainly stated that " death caused by a person during the course of a felony which involves violence " was a case of constructive malice which the Homicide Act has abolished, yet here it is asserted as the reason for the conclusion stated in the second sentence. On the face of it this is a *non-sequitur*. But even if it did follow that the burglary could be " some other offence " within the meaning of the Act, this would be no reason for holding that an assault with intent to do grievous bodily harm is *not* " some other offence." The judgment continues:

> " He killed that person because he realised that the victim

> recognised him and he therefore inflicted grievous bodily harm on her, perhaps only intending to render her unconscious, but he did intend to inflict grievous bodily harm. . . ."

Again, it must be asked, where is there any reason for the proposition that this is not " some other offence "? Continuing the judgment his lordship said

> ". . . The section then goes on: 'the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence." It would seem clear, therefore, that the legislature is providing that where one has a killing committed in the course or furtherance of another offence, that offence must be ignored. . . . It is not enough to say he killed in the course of the felony unless the killing is done in a manner which would amount to murder ignoring the commission of felony."

Once again where in the above words is there any justification advanced for regarding the felonious assault described as not being another offence than murder? The argument which seems to lie undetected within the language of the judgment is in effect this: a felonious assault constitutes implied malice because it is not " some other offence "; and it is not some other offence because it constitutes implied malice.

The remainder of the judgment consisted of a reference to the summing up of the trial judge, Hinchcliffe J., which the court stated that they thought was impeccable. The trial judge was cited as saying to the jury:

> " If you are in doubt whether the accused man had the intention to inflict grievous bodily harm upon Miss Duckett, it is right that in these circumstances the accused would be guilty of manslaughter, if you were satisfied that the accused had brought about the old lady's death without any malice, without any intention to do her grievous bodily harm. . . . If capital murder is not so proved, and you come to the conclusion that the accused killed Miss Duckett without any malice that is, without intending her any harm, or only trifling harm, then your verdict will be guilty of manslaughter.[48] . . . Murder is the intention to kill or to do grievous bodily harm; manslaughter is an unlawful killing, but without any intention. . . . Malice will be implied, if the victim was killed by a voluntary act of the accused—and here is the importance of what I am going to say—done with the intention either to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to

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[48] As to which last remark Lord Goddard interjected " for instance, a push to get her out of the way."

> interfere with the health or comfort of the victim. . . . Ask yourselves: Is it proved that the accused man killed Miss Duckett with malice, that is, when he struck the blows he intended to do her serious bodily harm? "

As to the interpretation of section 1 (1) of the Act, Lord Goddard proceeded to add:

> "The court desires to say quite firmly that in considering the construction of section 1 (i) it is impossible to say that the doing of grievous bodily harm is the other offence which is referred to in the first line and a half of the section. One has to show, independently of the fact that the accused is committing another offence, that the act which caused the death was done with malice aforethought implied by law. The existence of express or implied malice is expressly preserved by the Act and, in our opinion, a perfectly proper direction was given by Hinchcliffe J. to the jury and accordingly the appeal fails and is dismissed."

It has thus been clearly laid down that for the purpose of the law of murder within the Homicide Act, 1957, the expression "grievous bodily harm" is synonymous with "serious bodily harm," since the judgment states that it is "serious *or* grievous if it is such as seriously *and* grievously to interfere with the health *or comfort* of the victim." Moreover, it is stated that this harm "need not be permanent." And again the Lord Chief Justice said (at p. 328): "If a person does an act which amounts to the infliction of grievous bodily harm[49] he cannot say that he only intended to cause a certain degree of harm. It is called *malum in se* in the old cases and he must take the consequences." It seems, therefore, that the definition of grievous bodily harm for the purpose of the Homicide Act, 1957, is the same as for the purpose of the Offences against the Person Act, 1861, with the result that the law of murder has now been made more severe than in effect it was prior to the new Act. For, according to the above dicta, if a man, in circumstances which made it clear that he did not intend to imperil another's life but did intend to assault that person, were to strike a man with his fist intending to make his nose bleed or to blacken his eyes or cause a superficial laceration,[50] or should hit his hand with a stick and thereby break a finger, such hurt would constitute a grievous bodily harm within the Offences against the Person Act, 1861, and should death ensue (due to some unknown constitutional weakness or unexpected infection) the attacker would be guilty of murder since "he cannot say that he only intended to cause a certain degree of harm."[51] Furthermore, if a man were to shake a child to stop its screaming (as was the case in *R.* v. *Ward*[52]) and were thereby unexpectedly to cause its death this will certainly be murder[53] in view of the declaration in *R.* v. *Vickers* that "he cannot say that he only intended to cause a certain degree of harm."

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[49] Must it not be an infliction of grievous bodily harm to cause a person's death?

[50] See *R.* v. *Cox* (1818) R. & R. 362 where "a slight laceration about one inch in length from which no danger was apprehended" was held to be grievous bodily harm; *R.* v. *Ashman* (1858) 1 F. & F. 88, shooting liquid blood at a man who was stunned.

It may be expected that the effect of the Act, as it seems to have been interpreted in *R.* v. *Vickers,* will be to render the exercise by the Home Secretary of his discretionary power to invoke the prerogative of mercy rarer than heretofore.[54] The law of manslaughter may also be increasingly difficult to define, since cases in which only a minor unlawful hurt was intended or contemplated by the killer will come within the above definition of murder; even if, as seems reasonable, the words of the trial judge in *R.* v. *Vickers*: "manslaughter is an unlawful killing, but without any intention" should not be read as a general declaration constituting a definition of the felony of manslaughter but as though the word "such" had been inserted before the word "intention."[55]

Setting aside, however, the indirect effect which the judgment may have on the law of manslaughter, it is not easy to believe that the real intention of the judges was to make such a return towards the archaic doctrine of absolute liability in the law of homicide as the dicta in the Vickers judgment seem to indicate; viewing the judgment as a whole it is possible to imagine that their Lordships were really inspired by an undefined feeling that the essence of the liability of the accused man was to be found in his conscious readiness to risk a human life to gain his ends and that this subjective fact can only be established by evidence of what he did to the deceased. If then his attack on the victim was such that the jury, as ordinary " reasonable " men, would in the same circumstances themselves have realised that the victim's life was endangered they could properly feel certain that the accused also realised that death could result.[56] This would be a plain question of fact for the jury; but unfortunately the judgment as it stands is yet one further example of the confusion of principle and the practical dissatisfaction with the results of trials which may be engendered when matters of fact are allowed to be treated as matters of law.

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[51] Since this dictum appears in a considered judgment of the Court of Criminal Appeal it must presumably override the answer given to the Royal Commission on Capital Punishment, 1949–1953, in answer to Question 3164 in the *Minutes of Evidence*, p. 252:—when asked "If he inflicts grievous bodily harm he must know that death is likely to ensue?" Lord Goddard answered, "Yes, but then he may say 'I did not intend to inflict grievous bodily harm, I only intended to inflict a small degree of harm,' and, of course, in certain cases that might be perfectly true. A man might throw a stone at somebody which he thought was only going to hit him in a fleshy part of the body, but which put out his eye, and that might lead to death; but nowadays I do not think it could be in accordance with right feeling that it should be regarded as murder."

[52] [1956] 1 Q.B. 351.

[53] Attracting the fixed punishment of imprisonment for life, when not a capital murder.

[54] This, indeed, seems to have been envisaged: see, *e.g.*, *H.L. Weekly Hansard*, February 21, 1957, 1197–1200.

[55] That the words of the direction of the jury were not, and indeed could, in the circumstances, hardly be expected to be chosen with meticulous care, is shown by the statement that "malice will be implied if the victim was killed by a voluntary act of the accused . . . done with the intention either to kill or. . . ."

If in section 1 (1) of the Homicide Act, 1957, the phrase " (express or implied) " had been omitted after the words " the same malice aforethought " the courts could easily have adopted a definition of the mental element in the crime of murder which would be in accordance with the historical development of the common law of the crime, and would have satisfied the public conscience which objects to the idea that a man who had no intention either to kill or to risk killing, should be found guilty of murder, and suffer the fixed punishment of life imprisonment, or the death penalty if he happened to be engaged in one of the offences specified in sections 5 and 6 of the Homicide Act. It is not easy to see why " malice " in that Act should have any different meaning from that which the Court of Criminal Appeal itself declared it to have in *R.* v. *Cunningham*,[57] namely, " In any statutory definition of a crime " malice " must be taken . . . as (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (*i.e.*, the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it. . . . In our opinion, the word ' maliciously ' in a statutory crime postulates foresight of consequence."

Is it going too far to hope that in some future case the Court of Criminal Appeal may interpret its own decision in *R.* v. *Vickers* in this sense?

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[56] For a clear direction to the jury on these lines, see *R.* v. *Charlson* [1955] 1 W.L.R. 317, at p. 321, lines 3–26, *per* Barry J.

[57] [1957] 3 W.L.R. 76.

The Intention to Avoid Paying a Railway Fare

By A. E. Jones, *Magistrates' Clerk*

One of the commonest forms of fraud is that practised on the railway by passengers seeking to travel without paying the proper fare for their journey. The maximum fine for the offence—if it is detected—is £5 on a first conviction. Perhaps this is a reason why it is so common; it is almost certainly the reason why so few defendants charged with it are legally represented. This, in turn, is the reason why comparatively few points of law are raised on the interpretation of the statute in question. One of the most frequently encountered set of circumstances in which the charge is made does, however, lend itself to a defence on a technicality to which it is difficult to find a satisfactory answer.

In probably 75 per cent. of the cases which come before the courts the accused has entered a train without buying a ticket and then, at his destination, has said that he has come from a station much nearer than the one he has actually come from; if his story is accepted he will have avoided paying the difference between the two fares. On the occasions when the falsity of his tale is exposed by his answers to the ticket collector's questions he is charged under section 5 (3) of the Regulation of Railways Act, 1889, paragraph (*a*) of which makes it an offence "if any person travels or attempts to travel on a railway without having previously paid his fare and with intent to avoid payment thereof." A defendant who has made a deliberate mis-statement about his journey with this intent has clearly acted dishonestly and he is invariably convicted; indeed, in the majority of cases of this nature, there is a plea of guilty. But has the defendant, in such circumstances, necessarily brought himself within the terms of the section if no more is proved?

In many prosecutions of this type the accused affirms, usually in mitigation and not as a defence, that he boarded the train without a ticket, not with any dishonest intention, but simply because he had not time to buy a ticket before the train was due to leave the station. Sometimes he will go on to say that it was only when he had reached his destination and was approaching the exit barrier that the idea came to him of telling an untrue story about his journey to the ticket collector. If the intention to avoid paying the proper fare due was not, in fact, formed until after the traveller had left the train, it seems very doubtful whether an offence against the statute was committed. Construing the section in question by the ordinary rules of English grammar it must be read as a prohibition against travelling on the railway with the intention, *at the time of so travelling*, of avoiding payment of the fare due. Just as the intent to defraud in a false pretences case must be contemporaneous with the false pretence so it would seem that the idea of defrauding the railway must be in existence during the travelling on it, if it is to constitute the offence against section 5 (3) (*a*) of the Regulation of Railways Act, 1889. And it can hardly be said that a passenger is still travelling on the railway when he arrives at the ticket collector's barrier; the journey for which he should have paid his fare will have been completed when he left the train.

In a case of the type being considered there is hardly ever anything in the evidence to indicate when the defendant first formed the intention to avoid paying the full fare due. (If he has bought a ticket for part of his journey only he will be charged under paragraph (*b*) of section 5 (3), which makes it an offence to proceed knowingly and wilfully by train beyond the distance for which a fare has been paid without paying the additional fare due and with intent to avoid paying it.) In the ordinary case the passenger has not come under the notice of any witness until he presents himself at the exit barrier and embarks on his fictitious story. When cross-examination by the collector exposes its falsity the time of its invention does not usually emerge. If the facts are equally consistent with an explanation favourable to the defendant and an inference which renders him guilty, without doubt, of a criminal offence, ought that inference to be drawn? The principles of our law would appear to require that the defendant should not be deemed to have formed his dishonest intention at any earlier stage than can be clearly established by the evidence. In that case he would be entitled to have it accepted that the idea was not formed in his mind until after he had left the train, and therefore he had not travelled on the railway with intent to avoid paying his fare.

Whether or not a "technical" defence of this kind would be looked on with favour in the Divisional Court cannot be said, because nobody seems to have tried it even in a magistrates' court.

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A. E. Jones

1958

The Offences against the Person Act, Section 45

By C. Howard, LL.M.

The Offences against the Person Act, 1861, s. 45, provides that where someone has been prosecuted summarily for a common assault, or an aggravated assault on a female or a boy under fourteen, and is either acquitted or convicted, and pays any sum adjudged to be paid or serves any term of imprisonment to which he is sentenced, he shall be " released from all further or other proceedings, civil or criminal, for the same cause."

The section is the best known and most important of the cases[1] where criminal prosecution constitutes a bar to a subsequent civil action. Its practical importance is that in the cases to which it applies the person assaulted should always be advised to consider carefully whether to sue his assailant instead of prosecuting him. In this article the conclusion will be reached that with a little care the presumed intention of section 45 can be frustrated. Since the exercise of this care, however, depends on the possession of knowledge which is not thought to be widespread, the opinion may be expressed that the section serves no purpose more creditable than that of being an annoying and anomalous trap for those unlearned in the law. Why assaults should have been singled out for this unmeritorious distinction is a matter for conjecture. The damage caused by a summary assault is usually small. It is one of the cases where compensation is less important than the soothing of ruffled feelings and the prevention of retaliation. To duplicate the remedies may have been thought out of proportion to so slight a matter. Therefore recourse to the civil and the criminal courts was made alternative (or rather, as will be shown, attempted to be made alternative). But such an explanation is only guesswork.

This article is principally concerned to examine the extent of the bar to civil proceedings and the circumstances which bring it into play. Before doing so, the effect of the section on subsequent criminal proceedings will be briefly stated.

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[1] See also Game Act, 1831, s. 46; Larceny Act, 1861, s. 109; Malicious Damage Act, 1861, s. 67; Seamen's Clothing Act, 1869, s. 6; Public Stores Act, 1875, s. 12; and Protection of Animals Act, 1911, s. 4; but except for the first of these the existence of the bar is in doubt.

The criminal law

Judicial exposition, as might be expected, has been directed for the most part to elucidating "all further or other proceedings." The result in the criminal law may be summarised by saying that the section adds little or nothing to the common-law rule against double jeopardy. The most recent case [2] makes it clear that the point which arises whenever section 45 is pleaded in bar [3] is whether the offence charged in the indictment is substantially different from the assault previously charged. Thus it does not bar a subsequent prosecution for murder,[4] manslaughter,[5] or, in all probability, rape.[6] On the other hand, subsequent indictments for felonious [7] or unlawful [8] wounding are barred. In *Elrington* [8] Blackburn J. pointed out [9] that there are few assaults which could be said not to contain some ground for alleging a wounding. Probably this is the reason why they are within section 45.

Miles [10] was a felonious wounding case of particular interest, for the subsequent indictment there was held to be barred expressly on the ground of the common-law rule against double jeopardy. On summary trial, the accused had been discharged without either fine or imprisonment being imposed on his giving security to be of good behaviour. Since the common-law rule was held to apply, no decision was reached on whether section 45 set up a bar in these circumstances, but Pollock B.[11] doubted if it would. In view of the decision in the case, the question can hardly be determined now. Evidently, if the second charge is substantially the same as the first one the accused is being put in double jeopardy: but if the second charge is substantially different from the first one there is no room for section 45 to operate. Therefore, every time the question arises the court may proceed on the common law without resort to the statute.

Civil law: extent of bar

The prohibition extends to any claim founded in substance on the original assault, and may be pleaded by the defendant against any plaintiff.

It was soon made clear that facile evasions were not going to be permitted. In *Solomon* v. *Frinigan*[12] the plaintiff had successfully prosecuted the defendant before magistrates for assault. He brought the present action for damages and, being met with section 45, "replied that he did not sue for the assault, but for consequential damage consisting of loss to his business as a factor and salesman." The court would have none of this. The cause of action was the assault, and that was barred. Ten years later a similar situation arose in *Masper* v. *Brown*.[13] A married woman had successfully prosecuted the defendant for an assault[14] upon herself. Her husband now sued for consequential loss to himself arising from the assault. It was held that section 45 did not merely bar subsequent proceedings by the prosecutor, but any further action against the defendant by anyone at all. The decision carried *Solomon* v. *Frinigan*[12] a stage further. Henceforth, an impetuous prosecutor not only relinquished his own opportunity of being recompensed for his loss, but also performed the same service for third parties who might have had nothing to do with the decision to prosecute.

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[2] *Thomas* (1949) 33 Cr.App.R. 74.

[3] Autrefois convict or acquit.

[4] *Thomas* (1949) 33 Cr.App.R. 74.

[5] *Morris* [1867] 1 C.C.R. 90.

[6] *Miles* (1890) 24 Q.B.D. 423, 433–434, *per* Hawkins J.

[7] *Walker* (1843) 2 M. & R. 446.

[8] *Elrington* (1861) 1 B. & S. 688; 9 Cox C.C. 86.

[9] 1 B. & S. 688, 698.

[10] (1890) 24 Q.B.D. 423.

[11] At p. 435.

It is to be observed that in *Masper* v. *Brown*[13] the plaintiff was in a *paterfamilias* relationship with the prosecutor. Unfortunately this cannot be taken as a possible loophole for other third parties, because the reasoning that it is proceedings that section bars, and not prosecutors, is of general application. Moreover, it is consistent with the wording of the section.[15]

Civil law: limits to bar

By contrast, the courts have not been slow to limit the application of section 45 when it has been legitimately open to them to do so. The rule that the section benefits the defendant *in personam* laid down in *Masper* v. *Brown*[13] has been used to exclude anyone vicariously liable for him from its protection, and the references in the section to acquittal or conviction have been construed to require an adjudication of the issue in the strictest sense.

The vicarious liability point was settled in *Dyer* v. *Munday*.[16] A manager, in the course of his employment, committed an assault for which he was duly convicted. An action was then brought by the person assaulted against the employer. One of the defences raised was that section 45 applied as much to employer as to employee in matters arising out of the assault. This was firmly rejected by all three members of the Court of Appeal. The section referred to a specific person as being released. That person was the individual prosecuted, and the defendant had not been prosecuted. There was, therefore, no ground for interfering with the general law.

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[12] (1866) 30 J.P.J. 756.

[13] [1876] 1 C.P.D. 97. *Solomon* v. *Frinigan* was not mentioned.

[14] In the legal, not the popular, sense.

[15] *Masper* v. *Brown* was followed in the same year in the identical case of *Holden* v. *King* (1876) 46 L.J.Q.B. 75.

[16] [1895] 1 Q.B. 742.

As regards adjudication of the issue, it has to be borne in mind that the outcome of proceedings in a criminal court is not necessarily either a conviction or an acquittal. In *Hartley* v. *Hindmarsh*[17] the "magistrate after hearing the case ordered the defendant to enter into recognizances in £10, but that was in his character as conservator of the peace, and was not an adjudication upon the case. . . . In order that there may be a bar to a civil action there must either be an acquittal, or a conviction followed by fine or imprisonment; here there was neither." The action for damages for the assault was therefore not barred.[18] In *Miles*,[10] which has already been referred to, Pollock B. doubted[11] if section 45 applied where the accused was discharged on his giving security to be of good behaviour. It is submitted that, so far as subsequent civil proceedings are concerned, *Hartley* v. *Hindmarsh* shows that it does not.

An important application of these cases at the present day concerns probation. Being put upon probation is not a conviction for the purpose of section 45.[19] Neither would it appear to be an acquittal. It is therefore submitted that if a probation order can be obtained for the assailant, the victim will be free to sue.

Order of proceedings

The discussion has so far proceeded on the assumption that criminal prosecution for the assault has been resorted to first. Suppose that a civil action is brought first and damages recovered: does this in any way affect the bringing of a summary prosecution afterwards? It is submitted that it does not.

In *Ex parte Bryant*[20] Cockburn C.J. suggested that an accused person who had already been sued might have a good case of false imprisonment. But the section does not prohibit prosecution after action. It is the opposite case that it deals with. There seems to be no ground upon which to argue that ensuing imprisonment, or attendance for trial under compulsion, constitute a tort against the accused. Equally, it would be hard to maintain that the mere fact of prosecution after an action for damages indicated the malice required for malicious prosecution. It would also be inconsistent with the law as to agreements not to prosecute[21] if an action in tort were available to the accused in these circumstances.

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[17] (1866) L.R. 1 C.P. 553.

[18] Followed in Ireland in *Murray* v. *Fitzpatrick* (1914) 78 J.P.Jo. 521.

[19] Criminal Justice Act, 1948, s. 12 (1).

[20] (1863) 27 J.P. 277.

At first sight it seems odd that section 45 should have been enacted in its present form if it could be evaded by the simple expedient of suing first and prosecuting afterwards. The explanation probably lies in the fact that damages are of right, whereas criminal punishment is discretionary.[22] In other words, if criminal punishment is imposed after damages have been recovered, the damages awarded can be taken into consideration in assessing the sentence. The prosecutor cannot influence this. If, on the other hand, damages are claimed after criminal punishment has been imposed, the civil court cannot allow for this in its award to the plaintiff, because, having proved his case, he is entitled to recover his damage. Apart from this explanation, it is clear from the plain wording of section 45 that a prosecution is not barred by a previous action for damages. The conditions upon which further proceedings are prohibited are too carefully set out; there is specific mention, for example, of the sentence being served. Furthermore, it would surely be unprecedented for a civil judgment to have the effect of ousting the criminal law.

There appears to be only one authority on the question, and it comes from Northern Ireland. In *Magee* v. *Storey*[22a] the plaintiff had sued the defendant for assault and recovered damages. The defendant entered notice of appeal against the decision. Before the appeal was heard he was prosecuted[23] before magistrates for the same assault. He was convicted and fined and paid the fine. When the civil appeal came on at assizes the defendant contended, which, of course, he had been unable to do at first instance in the county court, that under section 45 " further and other proceedings " were barred; that the appeal was therefore barred as a further or other proceeding; and that the judgment at first instance should therefore be reversed. This argument was rejected and the lower courts were upheld on further appeal to the Court of Appeal.[24] The original judgment was perfectly valid and nothing that had happened since had invalidated it.

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[21] It is clear law that agreements not to prosecute, or to stifle a prosecution, are illegal and unenforceable, even if made with the sanction of the court. See the authorities collected in Archbold's *Criminal Pleading*, 33rd ed., p. 1268, note (a).

[22] Those major crimes where it is not are exceptional.

[22a] [1929] N.I. 134.

[23] Probably by the Crown, but this was not clear: Moore L.C.J. at p. 138.

[24] It does not seem to have occurred to the defendant that on his own argument he was barred from appealing.

The significant fact which emerges from the case is that the summary prosecution, which must have been by or on behalf of the plaintiff,[25] was carried through apparently without it occurring to anyone at any time that the civil action affected it.

Conclusion

It is difficult to avoid the conclusion that section 45 serves no useful purpose in its present form. If it is desired to bring both civil and criminal proceedings, one need only take the precaution of bringing the former first. So far as the criminal law alone is concerned, the section seems to add nothing to the common law. The best course would probably be to repeal it altogether, but if it should be thought preferable to retain the bar on subsequent civil proceedings there is a lesson to be learnt from Australia. By the Criminal Law Consolidation Act, 1935–40, of the state of South Australia, section 46 (2), magistrates are empowered to award " just " compensation at the conclusion of the criminal trial. If the offence is proved, compensation, if applied for, must be awarded. The only element of discretion is as to the sum appropriate to repair the harm done.[26] It will be seen that this combines a proper respect for the rule in section 45 with avoidance of its most useless consequence.

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[25] The O.A.P.A., s. 42, gives power for indictable assault to be tried summarily only on complaint by or on behalf of the party aggrieved.

[26] *Law* v. *Wright* [1935] S.A.S.R. 20; *Church* v. *Roberts* [1946] S.A.S.R. 65. The bar on subsequent civil proceedings is preserved by s. 46 (4).

Practice and Procedure

Central Criminal Court

Absence of alderman

In *R.* v. *Kiley* (Court of Criminal Appeal: Lord Goddard C.J., Donovan and Havers JJ.: October 28, 1957) K. was convicted at the Central Criminal Court of robbery with violence in February, 1953. He then appealed against his conviction to the Court of Criminal Appeal and that appeal was dismissed. The present case came before the Court of Criminal Appeal on a reference by the Secretary of State for Home Affairs in exercise of his powers under section 19 (*a*) of the Criminal Appeal Act, 1907. It was submitted on behalf of the appellant that the trial had been a nullity by reason of the fact that the court had not been presided over by " at least two aldermen of the City of London " as required by section 2 of the Central Criminal Court Act, 1834. For the purposes of the hearing of each case all judges and commissioners of oyez and terminer were aldermen of the City of London whilst presiding in any such court. An alderman was normally present at the Central Criminal Court until the end of the day's session, but on this occasion the trial proceeded for a period of some twenty minutes whilst no such alderman was present. It was *held,* dismissing the appeal, that it was not necessary for the court to decide whether the Central Criminal Court had been properly constituted during the period in question, but for the purposes of this appeal they would assume that it was not. The same matter could not arise again because the commission at the Central Criminal Court now included the clerk of the court and his associates, so that the highly technical requirements of the Act were now satisfied in that way. In the present case no evidence for the Crown had been led during the period in question, and only twenty-three questions had been asked in cross-examination; and the witness had again been cross-examined the following day. The result was simply that certain inadmissible evidence had been given. This was essentially a case to which the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (on the ground that there had been no miscarriage of justice), should be applied, and the appeal would, therefore, be dismissed. [H. P.]

Summary Justice

Animals

Failing to cleanse and disinfect a lorry used for transporting animals at Wadhurst Market; fined £3; Nichlinson: Mark Cross Magistrates' Court (*Sussex Express and County Herald*, November 22).

Assault

Assaulting B. and occasioning him actual bodily harm by setting off a firework which shot across the road and struck B. in the face, causing a cut and severe burning and bruising; fined £3; Browning: Lewes Magistrates' Court (*Sussex Express and County Herald*, November 22).

Dangerous drugs

Unlawfully possessing a quantity of Indian hemp which he said he had grown himself; six months' imprisonment; Adigbert: Birmingham Stipendiary Court (*Birmingham Mail*, November 7).

Food and drugs

Smoking while handling food contrary to the Food Hygiene Regulations, 1955, reg. 9; fined £5; Green: Hastings Magistrates' Court (*Sussex Express and County Herald*, November 22).

Litter

Dumping a mixed assortment of rubbish on the highway contrary to the provisions of a Staffordshire County Council by-law of 1939; fined £2; Allport: Lichfield Magistrates' Court (*Birmingham Mail*, November 6).

Road traffic

Having a dangerous mascot, *i.e.*, a pair of cow horns, 10½ inches from tip to tip, on his motor-cycle, contrary to the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 103; fined 5s.; Crockett: Chesham Magistrates' Court (*Evening Standard*, November 6).

Sale and trade

Selling goods under a wrong description contrary to the provisions of the Merchandise Marks Act, 1877; slacks made of rayon warp and wool weft, described as " worsted "; fined £50 and ordered to pay £25 costs; Weaver to Wearer, Ltd.: Bolton Magistrates' Court (*Manchester Guardian*, November 29).

Street trading

Carrying on the business of a photographer in Trafalgar Square without a Ministry of Works permit; fined a total of £78 after pleading guilty to sixty-four charges and fourteen summonses: Holley: Bow Street Magistrates' Court (*The Times*, November 5).

*Case and Comment**

Appeal—*appeal allowed on grounds that evidence for the prosecution was suspect*

R. *v.* GRANT [1] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: November 25, 1957) (*The Times*, November 26, 1957).

G. was convicted at a Crown court of keeping a brothel and of permitting children to reside at the brothel. At the trial the evidence for the prosecution was mainly that of police witnesses who said that there were constant visitors to the house, including men taking women there, and that conversations, for example one visitor being told " it will be £3 tonight," were heard. At the committal proceedings two police officers gave evidence that on a particular Saturday night they had seen G. open the door to admit somebody. At the trial the two officers at first gave the same evidence which they had given at the magistrates' court, but in cross-examination they said that on reflection they were not sure that it was G. who had opened the door. The two officers, and also their sergeant, were cross-examined further as to why they had altered their evidence, and it was suggested to them that it was because they had heard that G. was going to set up an alibi for that occasion. All the officers denied that they knew anything of an alibi prior to the case coming for trial. The recorder, having been informed by counsel for the prosecution that the officers did in fact know of the proposed alibi prior to the case, gave a certificate of appeal on the grounds: " That it appears to me that two of the witnesses for the prosecution [naming one constable and the sergeant] were guilty of perjury in statements made by them in their evidence which statements were material in this case."

On appeal to the Court of Criminal Appeal the court was informed that the police sergeant, in conversation prior to the case, had informed counsel for the prosecution that he had heard that G. was elsewhere on the night in question. In the middle of the summing-up both counsel saw the recorder in his private room and informed him of the facts. The recorder took the view that he could do nothing at that stage but conclude his summing-up on the evidence as it had been given.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the appellant: *J. S. Watson Q.C.*, *J. M. Dovener* (instructed by Messrs. Robert Benjamin, Liverpool). For the Crown: *J. Melville Kennan* (instructed by T. Alker, Esq., Liverpool).

Held, allowing the appeal, that if there was any reliance to be placed upon the evidence of the police officers, there was abundant evidence that G. had been conducting a brothel. The evidence of the alibi was exceedingly strong and the court had no reason to doubt that G. had an alibi for this particular night. When the police sergeant said in cross-examination that he did not previously know of the alibi, it was difficult to know why counsel for the prosecution had not intervened to tell the recorder what he knew or to say that he disowned the sergeant's evidence; and the matter ought to have been put directly to the witness in the form: "Did not you tell counsel for the prosecution that you had heard about the alibi." That question was not put and this court was not expressing any opinion as to whether the police officers were committing perjury; there was not the material upon which to base such an opinion. When the recorder was told of the circumstances the court thought that he ought to have recalled the police sergeant; the case was not finished at that stage and the jury was not enclosed. This court thought that the conviction ought to be quashed because, if the whole matter had been probed, the jury might have felt unable to accept the police evidence at all on the grounds that if the officers were lying about one thing they might also be lying about the others. [H. P.]

COMMENTARY. The court suggested that the prosecution witness should have been recalled although the summing up had started. *Cf. R.* v. *Flinn* below, p. 57. The distinction appears to be that here the witness would have been recalled on behalf of the defence; the court treated the case as if an application to recall the sergeant had been made by the defence and refused.

Committal for trial—*Bill of indictment—joint charges*

R. *v.* WILLIAMS, HOWARD and BALMFORTH [2] (Essex Quarter Sessions: Roland Adams Q.C. and justices: September 6, 1957).

The accused were committed for trial by justices to Essex quarter sessions on a joint charge of assaulting M. with intent to rob her contrary to section 23 (3) of the Larceny Act, 1916. The

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[2] For the Crown: *Edward Clarke* (instructed by Solicitor, Metropolitan Police). For the accused: *Lionel Thompson* (instructed by Bowling & Co.), *G. D. Black* (instructed by Wiseman & Greenman), *D. N. Keating* (instructed by Thomas Griffith, Barking).

Crown preferred a bill of indictment at quarter sessions which included an additional count of conspiracy to steal and a count alleging that the accused, *being together*, assaulted M. with intent to rob her contrary to section 23 (1) of the Larceny Act, 1916, the latter offence not being triable at quarter sessions. The clerk of the peace felt unable to sign the bill of indictment. On an application by the Crown for a direction that the clerk of the peace should sign the bill and for the case to be transmitted to the next assizes for trial, it was contended by the Crown that there had been a committal on the wrong charge as there could not be a joint charge under section 23 (3) and the depositions disclosed an offence under section 23 (1). It was submitted on behalf of the accused that there could be several findings of guilty against each of the accused upon the section 23 (3) charge even though the accused were present together at the time of the assault, and further that by virtue of the provisions of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and section 1 of the Assizes Relief Act, 1889 (as amended by the Magistrates' Courts Act, 1952) quarter sessions had no jurisdiction either to sign the bill or to send the case for trial to the assizes.

Held, refusing the application (1) that there had been a proper committal on the section 23 (3) charge even though the depositions might also reveal an offence under section 23 (1); (2) that by virtue of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the clerk of the peace could not be directed to sign a bill of indictment containing a count charging an offence not triable at quarter sessions. [G. D. Black, *Barrister-at-Law*.]

COMMENTARY. The Administration of Justice (Miscellaneous Provisions) Act, 1933, section 2 (2) provides that, where a person has been committed for trial, the bill of indictment may include offences other than the offence for which he was committed, provided that they are founded on facts disclosed at the preliminary examination and are offences which may lawfully be joined in the same indictment. Charges may lawfully be joined in the same indictment if they are founded on the same facts, or form, or are part of a series of offences of the same or a similar character: Indictments Act, 1915, Schedule I. Rule 3.

Corroboration—*identification parade.*

R. *v*. BEADLE [3] (Court of Criminal Appeal: Lord Goddard C.J., Gorman and Diplock JJ.: November 4, 1957).

B. was convicted at quarter sessions of receiving stolen goods.

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[3] For the appellant: *W. M. F. Hudson* (instructed by Dale and Newberry, Brentford). For the Crown: *Niall MacDermott* (instructed by Poole & Co., Brentford).

At the trial M., one of the thieves, gave evidence that he had sold the stolen goods to B. and his partner, and that B. had paid over to him some of the price in cash. B. said in evidence that he had never seen M. before until he saw him at the magistrates' court. There was evidence that M. had identified B. at an identification parade. B. appealed to the Court of Criminal Appeal on the ground that the recorder had misdirected the jury by telling them that the identification by M. was corroboration of M.'s evidence.

Held, dismissing the appeal, that there was clearly a misdirection and the point of law would, therefore, be decided in favour of B. The identification of B. at the identification parade could not be corroboration because an accomplice could not corroborate himself. The same error had been made in *R.* v. *Coulthead* (1933) 24 Cr.App.R. 44, where it was said that certain evidence might be corroboration which was, in fact, evidence of consistency of conduct. In the present case the identification was very strong evidence of consistency of conduct which, together with the other evidence against B., satisfied this court that there had been no miscarriage of justice. The court would, therefore, apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and dismiss the appeal. [H. P.]

COMMENTARY. The rule that a witness cannot corroborate himself is well-established. See *R.* v. *Christie* [1914] A.C. 545, 548: "You do not corroborate the truth of a statement by saying that it was made before—repetition is not corroboration," *per* Sir John Simon, *Att.-Gen. arguendo*. Complaints by the victims of sexual offences are similarly evidence of the consistency of conduct of the complainant, but do not amount to corroboration. This rather subtle distinction is put thus, by Cockle, *Cases and Statutes on Evidence* (9th ed. by G. D. Nokes) 79: "Evidence of the complaint is not corroboration of the facts alleged . . . though it may be corroborative of the credibility of the prosecutrix." The same would seem to be true of the evidence of the identification parade in the present case.

Court of Criminal Appeal—*Verdict substituted on plea of Guilty*

R. *v*. HILLAN[4] (Court of Criminal Appeal: Lord Goddard C.J., Donovan and Diplock JJ.: October 30, 1957).

H., who was unrepresented, pleaded guilty to attempted rape and was sentenced to four years' imprisonment. A second count charging assault with intent to ravish was not put to H., although the depositions only justified this charge. On appeal to the Court of Criminal Appeal against sentence only:—

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[4] For the appellant: *N. R. Blaker* (instructed by the Registrar, Court of Criminal Appeal).

Held, reducing the sentence to two years' imprisonment, that the court would exercise its powers of ordering the verdict to be entered which ought to have been entered, and would alter the conviction to one of assault with intent to rape. [H. P.]

COMMENTARY. By the Attempted Rape Act, 1948, s. 1, attempted rape (a common law misdemeanour) is punishable with seven years' imprisonment. An assault with intent to commit felony is a misdemeanour, punishable with two years' imprisonment under the Offences against the Person Act, 1861, s. 38.

Food and drugs—*foreign body—" substances," " quality " or " nature "*

LOVELL *v.* ANDOVER CORPORATION [5] (Andover Borough Quarter Sessions: Recorder, Edgar S. Fay, Esq., Q.C., M.A.: November 21, 1957).

In this case the appellant had been convicted before the borough magistrates on a charge under section 2 of the Food and Drugs Act, 1955, in that he had sold food " not of the substance demanded," to the prejudice of the purchaser. The facts showed that the appellant's dairy had supplied to a local school a bottle of milk which was found to contain a bristle. On appeal to quarter sessions it was argued that the information was incorrectly laid, in that if there were an offence at all, " quality " or " nature " should have been charged, not " substance " (only one of the three offences may be charged in the one information: *Bastin* v. *Davies* [1950] 2 K.B. 579). Following a note in Bell's *Food and Drugs* (13th ed. at p. 18), which had been approved by the Lord Chief Justice in *Bastin* v. *Davies*, the learned recorder held that " substance " was the correct offence to charge in a case of a " foreign body " such as this.

However, the learned recorder also found that as a consequence of *Edwards* v. *Llaethdy Meirion* [1957] 3 C.L. 461 ; [1957] Crim. L.R. 402, the foreign body must be shown to be harmful in some way ; on the facts proved before him, this had not been established to his satisfaction and he therefore allowed the appeal with costs.

[J. F. Garner, *Solicitor*.]

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[5] For the respondent: *Norman Brodrick* (instructed by the Town Clerk, Andover). For the appellants: *Mr. S. G. Priestley* (instructed by Barker, Son and Isherwood, Andover).

COMMENTARY. See the commentary on *Edwards* v. *Llaethdy Meirion* at [1957] Crim.L.R. 403.

In *Lindley* v. *George W. Horner, Ltd.* (1950) 66 T.L.R. (Pt. 1) 296, the court seems to have held that an information would lie under the "quality" provision, where a nail was found in a butter drop sold by the accused.

Food and drugs—*not of the quality demanded—whether supplier or manufacturer liable*

SIMMONDS *v.* LONDON CENTRAL MEAT CO., LTD. AND ANOTHER [6] (Q.B. Divisional Court: Lord Goddard C.J., Donovan and Havers JJ.: October 16, 1957).

M. was charged under section 2 of the Food and Drugs Act, 1955, with selling food, namely, a pork pie, to the prejudice of the purchaser and not of the quality demanded in that it was mouldy. M. in his turn preferred an information against the supplier, in accordance with section 113 of the Act, alleging that the contravention complained of was due to the supplier's act or default. The supplier preferred a similar information against the manufacturer. Bedford borough justices found that the pie, which had been bought by a customer from a canteen operated by M. on February 12, and which appeared to be in perfect condition, when cut in half later was found to contain green mould. Accordingly the pie was not of the quality demanded by, and was sold to the prejudice of the customer. The pie was one of a number delivered by the supplier to M. on the morning of February 12, the pies having being made by the manufacturer at a factory at Hitchin. There was no way of telling the date and time of manufacture and there was a possibility of a freshly baked pie becoming mixed up with a stale pie on the manufacturer's premises. 36 pies were delivered to the supplier's shop in Bedford and placed in the refrigerator. It was possible that an old pie got mixed up with the new pies. Eight of those pies were subsequently collected by the manager of the supplier's other shop and delivered to M. at the canteen.

It was contended on behalf of M. that the contravention was due to the act or default of the supplier and that he, M., used all due diligence and was entitled to be acquitted. Both the supplier and the manufacturer contended that the contravention had not been proved to be due to his act or default. The appellant contended that if either of the respondents had failed to prove that the contravention was due to the act or default of the next respondent then that respondent must fail in the defence under section 113 of the Act and should be convicted.

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[6] For the appellant: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co. for G. F. Simmonds, Town Clerk, Bedford). The first respondent did not appear and was not represented. For the manufacturer: *Wilfrid Fordham* (instructed by Brignall, White & Orchard).

The justices were of opinion that an offence had been committed by M. but that he had established that he had used all due diligence and that the contravention was due to the act or default of the supplier. They dismissed the information against M. As far as the supplier and manufacturer were concerned the justices were unable to say whether the contravention was due to the act or default of either and they accordingly dismissed the informations against both. On appeal by the prosecutor.

Held, that a person summoned under section 2 had a defence if he could prove that the goods he sold, though faulty, had been supplied to him by some other person and that he had used all due diligence in respect of them, but unless he could so satisfy the justices he could not escape conviction. The matter had been dealt with in *Moore* v. *Ray* [1950] 2 All E.R. 561. The position was the same between a supplier and manufacturer. The justices had found that the pie was defective when it was supplied to the retailer and therefore the supplier was liable to be convicted unless he could throw the blame on to some other person. In fact he could not do so. There was no finding that the manufacturer had supplied a defective pie. The supplier must be convicted and the case must go back to the justices with a direction accordingly.

[Mrs. E. M. Wellwood, *Barrister-at-Law*.]

COMMENTARY. The accused who seeks to transfer liability to a third person under section 113 of the Food and Drugs Act, 1955, must prove (a) that the contravention was due to the act or default of the third party, and (b) that he himself has used all due diligence to comply with the requirements of the Act.

To have a defence, however, he must prove both these things, and if he can establish only (a) and not (b), then *both* the original accused and the third party are liable to conviction. If the justices are left in doubt as to who caused the contravention then they should convict the original accused and acquit the third party: *Moore* v. *Ray* [1950] 2 All E.R. 561.

It is not necessary to prove any *mens rea* or negligence on the part of the third party. Thus in the instant case it would not have been necessary to show that the supplier either knew, or ought to have known, that he was supplying a mouldy pie. It was enough that he had supplied such a pie. See *Lindley* v. *Horner* [1950] 1 All E.R. 234.

Quaere, whether the burden on the original accused is proof beyond reasonable doubt, or proof on balance of probabilities? On principle it seems that (a) should be proved beyond reasonable doubt, as it results in the conviction of the third party; but that proof on a balance of probabilities should suffice for (b) as this is simply a matter of defence: *cf. R.* v. *Carr-Briant* (1943) 29 Cr.App.R. 76.

Fraudulent conversion—*Cheque or proceeds thereof—honest belief in ability to provide funds*

R. *v*. BANYARD AND LACEY [7] (Central Criminal Court, October 15).

The defendants were charged with conspiracy to defraud, false pretences (one count) and fraudulent conversion (fifteen counts). It was proved that certain clients of the firm handed to the firm cheques in payment for stocks and shares. The cheques were paid into the firm's general account with the bank, the account being overdrawn. It was not customary for stockbrokers to keep a separate clients' account into which the money of clients should be paid. Stocks and shares were either not bought or, having been bought, were either pledged with the bank as security for the overdraft or sold and the proceeds deposited in the account. After argument, in which the following cases were referred to: *Thomson* v. *Clydesdale Bank, Ltd.* [1893] A.C. 282; *R.* v. *Nelson* [1902] A.C. 250; *R.* v. *Carpenter* (1911) 22 Cox 618; *R.* v. *Kritz* [1950] 1 Q.B. 82; *R.* v. *Williams* [1953] 1 Q.B. 660, Judge Aarvold directed the jury that: (1) Where the particulars of offence alleged that "having received a cheque for —— for or on account of —— fraudulently converted the same or the proceeds thereof to their own use and benefit," the count charged only the conversion of the cheque or the money into which it was changed by payment into the bank and was not wide enough to cover the conversion of stock bought with the said money; (2) where stocks and shares were never in fact bought, in considering whether or not there was a fraudulent conversion when the cheque was paid into the firm's bank account, an honest belief that in due course money would be available to pay for stock according to the client's instructions would be a good defence. On the other hand if, at the time of paying the cheque into the bank, the defendant had no intention of taking up the stock or shares, then there was a fraudulent conversion; (3) where stock or shares were bought (and the count concerned charged a conversion of such stock or shares) the question whether they were bought solely to be pledged to the bank for the benefit of the firm or with the intention that they should be delivered to the client was to be considered in deciding whether there was a fraudulent conversion of the stock or shares.

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[7] For the prosecution: *Maxwell Turner, J. H. Buzzard* (instructed by The Director of Public Prosecutions). For the defendant Banyard: *A. Karmel Q.C., I. C. Baillieu* (instructed by Galbraith & Best). For the defendant Lacey: *B. J. M. McKenna Q.C., J. N. Dunlop* (instructed by L. Macassey).

COMMENTARY. Compare *R.* v. *Williams* [1953] 2 W.L.R. 937, 942, where the Lord Chief Justice said that a person who takes money, which he is not in a position to replace at the time, but only has a hope or expectation that he will be able to do so in the future, may be held to be fraudulent for the purposes of larceny; whereas, if the taker has both the intention and the present ability to repay, there is no evidence of fraud. Judge Aarvold seems to have applied a more lenient test in the present case. For a discussion of the meaning of the word "fraudulently" in section 1 of the Larceny Act, see [1956] Crim.L.R. 78 and 238.

Jurisdiction—*Road traffic—Statutory time limit for prosecution—Whether applicable to summary proceedings only—Altering during licence—Using driving licence—Meaning of "using"*

R. *v.* MCCARDLE [8] (Nottinghamshire Quarter Sessions: T. R. Fitzwalter Butler, Esq., Chairman: November 12 and 13, 1957).

The defendant was indicted at Nottinghamshire adjourned quarter sessions held at Newark with altering, with intent to deceive, a driving licence, contrary to section 112 (1) (*a*) of the Road Traffic Act, 1930, and, in a second count, with using, with intent to deceive, a driving licence, contrary to the same subsection. Counsel for the defendant moved to quash both counts, on the ground that proceedings were barred by section 33 (1) of the Road Traffic Act, 1934, which provides: "Notwithstanding any enactment prescribing the time within which proceedings may be brought before a court of summary jurisdiction, proceedings for an offence under section 112 of the principal Act [the Act of 1938] . . . may be so brought—(a) within a period of six months from the date of the commission of the alleged offence; or (b) within a period which exceeds neither three weeks from the date on which it came to the knowledge of the prosecutor that the offence had been committed nor one year from the date of the commission of the offence; whichever period is the longer." The court ruled that section 33 (1) of the Act of 1934 applied only to cases where offences under section 112 (1) (*a*) of the Act of 1930 were prosecuted summarily and that there was no time limit where proceedings were by way of indictment. They, accordingly, refused to quash either count and the trial proceeded.

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[8] For the prosecution: *D. M. Cowley* (instructed by F. G. Crawley, Worksop). For the defence: *A. P. Marshall* Q.C. and *R. D. Lymbery* (instructed by A. E. Furniss & Co., Worksop).

At the close of the case for the prosecution counsel for the defendant submitted that there was no evidence to go to the jury on the second count, as the only user on which the prosecution relied was the sending of the licence to the local authority for the purpose of renewal and that this did not constitute user within the meaning of the subsection. The court accepted this submission and the chairman said that, in their view, the user must be in connection with the driving, or attempted driving of a motor vehicle. They, accordingly, withdrew this count from the jury. Evidence was then called for the defence, and the jury returned a verdict of not guilty on the first count.

[T. R. Fitzwalter Butler, Esq., *Barrister-at-Law*.]

COMMENTARY. The offences under section 112 (1) (*a*) of the Road Traffic Act, 1930, are punishable on indictment with imprisonment for a term not exceeding two years, or, on summary conviction, with imprisonment for a term up to four months or a fine up to £100, or both.

It is provided by the Magistrates' Courts Act, 1952, s. 104, that, except as otherwise expressly provided, magistrates' courts should not try informations laid more than six months after the offence was committed. Section 33 (1) of the Road Traffic Act, 1934, creates an exception to this general rule.

In the case of indictable offences, on the other hand, the general rule of the common law is that a prosecution may be commenced at any length of time after the offence. There are certain statutory exceptions to this rule, for which see Archbold, 33rd ed., p. 61.

Jury—*Borough Quarter Sessions—Tales de circumstantibus*

R. *v*. SOLOMON [9] (Court of Criminal Appeal: Lord Goddard C.J., Gorman and Pearson JJ.: November 11, 1957) (*The Times*, November 12, 1957).

S. was indicted at borough quarter sessions for larceny. Through some mistake all the jurors who had been in attendance had been dismissed and the clerk of the peace proceeded to pray a *tales*. Twelve persons, all of whom were resident in the borough or the county, were collected from outside the court and were sworn in as jurors. S., who was represented, was asked if he had any objection and said that he had not. The jury convicted S. On appeal to the Court of Criminal Appeal:—

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[9] For the appellant: *Edward Clarke* (instructed by Hempsons). For the Crown: *C. J. T. Pensotti* (instructed by the Town Clerk, Brighton).

Held, allowing the appeal, that the question must be decided under the common law. Section 37 of the Juries Act, 1825, which dealt with *tales de circumstantibus* did not apply to borough quarter sessions. The law on the subject was obscure and this court was not going to inquire whether the talesmen need be actually present in the precincts of the court or whether they could be brought in from the street. One thing was clear from the authorities, that a complete jury could not be composed of talesmen. The very fact that it was a *tales* implied that there must be a *quales*, that is, those who have been summoned. In the present case there was no qualified person amongst the jury and it was as if the trial had taken place before no jury at all. This defect could not be cured by acceptance of the proceedings by the prisoner or his counsel. The verdict would, accordingly, be set aside and the court would order a *venire de novo* to issue. [H. P.]

COMMENTARY. According to Hawkins, *Pleas of the Crown* (3rd edition, by J. Curwood, 1824) 565, " if all the persons returned on a *habeas corpora* be challenged and drawn, there shall not be a *tales* awarded, but a new *venire facias*; for the word *tales* plainly refers to some others [*quales*] to whom the persons returned are to be like."

A *venire facias de novo* is a second writ to summon another jury for a new trial. Where there has been a trial and the conviction is quashed, the Court of Criminal Appeal has no power to order a second trial. Where, however, as here, the first " trial " is a nullity and the accused has never been in peril, there is power to order a new trial.

Mental Defective—*Carnal knowledge of—Woman not legally certified*

R. *v.* HEAD[10] (Court of Criminal Appeal: Lord Goddard C.J., Donovan and Havers JJ.: October 21 and November 1, 1957) (*The Times,* October 22 and November 2, 1957).

H. was convicted at assizes of having carnal knowledge of a mental defective contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. It was not disputed at the trial that sexual intercourse had taken place, nor that H. knew the woman to have been detained in an institution and to be on licence therefrom. The defence was that the woman had never legally been certified as a mental defective. On appeal against conviction to the Court of Criminal Appeal, H. contended that, as the woman's detention in the institution was illegal she was not, therefore, subject to any licence. Neither the Crown nor the Board of Control sought to contend that the order of detention was valid,[11] but it was argued on behalf of the Crown that all the prosecution had to prove to establish a case, in addition to the fact of carnal knowledge having taken place, was that the girl was in fact in an institution for care or treatment or that she was out on licence from such an institution; the section did not require proof that the girl was a defective, and in any event there was unchallenged medical evidence that the girl was in fact a mental defective.

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[10] For the appellant: *G. D. Guthrie Jones* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Sir R. Manningham-Buller Q.C., Att.-Gen., A. S. Booth* (instructed by the Director of Public Prosecutions). For the Secretary of State for Home Affairs and the Board of Control: *Rodger Winn* (instructed by the Solicitor, Ministry of Health).

Section 56 (1) (*a*) of the Mental Deficiency Act, 1913, provides that: " Any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act " is guilty of an offence.

Held, allowing the appeal, that the words " under this Act " in section 56 (1) (*a*) applied to a girl under care or treatment in an institution and also when placed out on licence as well as to one under guardianship. Unless the woman or girl was a person who had been made subject to the Act, the section did not apply. The section could have no application to the case of a woman who had not been found to be a mental defective under the Act, and still less to one who was unlawfully detained in an institution although she was being subjected to care and treatment. If a person was being unlawfully detained she needed no licence to go out. The effect of section 56 (1) (*a*) was to make carnal knowledge of a mental defective an offence and that must mean a mental defective under the Act. It was not sufficient for the prosecution to prove at the trial that the person was in fact a mental defective, unless she was a mental defective under the Act. In the present case no offence had been committed because the girl had never lawfully been made subject to the Act.

Per LORD GODDARD C.J.: In a prosecution for this offence (which is now brought under section 8 of the Sexual Offences Act, 1956) evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act. [H.P.]

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[11] The medical certificates on which the order of detention was made purported to show that the girl was a " moral defective." A " moral defective " must be a mental defective with strongly vicious or criminal propensities, etc., as defined by the Mental Deficiency Acts. There was nothing in the certificates to justify this classification.

[NOTE: The Attorney-General has granted a fiat for appeal to the House of Lords in this case.]

COMMENTARY. The court thought the case of such importance that it exercised its powers under section 1 (5) of the Criminal Appeal Act, 1907, to deliver separate judgments.

There has been a number of reported cases of illegal detention under the Mental Deficiency Act lately, and the Lord Chief Justice remarked that " one wondered how many other persons were being detained under orders that were invalid."

Prejudice—*Change of venue—judge's power to send case over*

R. *v.* OLIVER[12] (Q.B. Divisional Court: Lord Goddard C.J., Devlin and Pearson JJ.: November 25, 1957) (*The Times*, November 26, 1957).

On August 21, 1957, the defendant, who had been arrested on, and held in custody since, July 8, was committed for trial, to Exeter Autumn Assizes, on a charge of murder. On November 4 the trial began. Counsel for the prosecution deliberately abstained from opening certain matters which had been opened before the magistrates, recorded in the depositions and reported in the local Press. On November 5 three national newspapers published reports of the first day of the trial which were, in some respects, inaccurate. Counsel for the prosecution drew the attention of the court to these reports; and it was submitted, on behalf of the defence, that it was impossible to continue the trial because of the possibility of prejudice, and that the trial should take place, in March, 1958, at Hampshire Winter Assizes. The judge accepted the submissions of the defence and made an order accordingly.

In support of a motion by the Attorney-General to change the venue, it was submitted that the order which the judge had made was invalid; that although there would have been power to send the case over to a subsequent Autumn Assize, either on the Western or another circuit, or to the Exeter Winter Assizes (to be held in February, 1958), or to a prior Winter Assize, there was no power, under section 14 (2) of the Criminal Justice Act, 1925, to send the case over to a Winter Assize subsequent to the Exeter Winter Assizes. In asking for an order for trial at the Central Criminal

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[12] For the Crown: *The Attorney-General* (*Sir Reginald Manningham-Buller Q.C.*), *E. S. Fay Q.C.*, *Rodger Winn* and *Michael Hoare* (instructed by the Director of Public Prosecutions). For the defence: *Norman Skelhorn Q.C.* and *Hugh Park* (instructed by Theodore Goddard & Co. for Crosse & Crosse, Exeter).

Court in December, 1957, it was further submitted that delay until March, 1958, was undesirable.

In opposition to the motion, it was submitted that the trial judge had had a discretion in this matter, that he had exercised it correctly, and that the order was accordingly valid. It was further submitted that in view of the publicity which the matter had already received, and—unless the court made an appropriate order—would, as the result of the present proceedings, receive, delay until March, 1958, was highly desirable.

The court, refusing to make an order prohibiting the publication of the present proceedings, made an order in accordance with the motion for the trial of the defendant at the Central Criminal Court in December, 1957. [D. C.]

COMMENTARY. Under section 14 (2) of the Criminal Justice Act, 1925, where a trial at assizes or quarter sessions is either not proceeded with, or not brought to a final conclusion, the court has a discretion to order the trial to take place before a court of assize or quarter sessions for some other place, if the court " thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship."

In empowering the trial court to direct an indictment to be tried at a foreign court, section 14 (2) created a new power, and their Lordships held that it must be limited to committal to the next assizes or sessions for that other place. As the matter was one of jurisdiction, consent could not enlarge this power.

Public Health Act, 1936—*Crown, whether binding on—hospital*

NOTTINGHAM NO. 1 AREA HOSPITAL MANAGEMENT COMMITTEE *v.* OWEN[13] (Q.B. Divisional Court: Lord Goddard C.J., Donovan and Havers JJ.: October 15, 16, 1957) ([1957] 3 W.L.R. 707).

The chimney of the General Hospital, Nottingham, had for some years emitted black smoke in such quantities as to be a nuisance. In July, 1948, the hospital had, by virtue of section 6 of the National Health Service Act, 1946, vested in the Minister of Health. The hospital provided hospital and specialist services under Part II of the 1946 Act; and it was under the management and control of the hospital management committee on behalf of the regional hospital board set up under the Act.

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[13] For the hospital management committee: *Rodger Winn* (instructed by the Solicitor, Ministry of Health). For the local authority: *J. Elson Rees* (instructed by Sharpe, Pritchard & Co. for Town Clerk, Nottingham).

In March, 1947, the town clerk of the City of Nottingham, acting for and on behalf of the local authority, having served an abatement notice, issued a complaint under section 103 of the Public Health Act, 1936, against the hospital management committee, asking that they be summoned to show cause why an order should not be made requiring them to abate the nuisance. At the hearing the respondents contended that the justices were without jurisdiction. It was said that the hospital was Crown property, occupied for the public service of the Crown; that the Public Health Act, 1936, did not bind the Crown; and that section 106 was accordingly applicable. Section 106 provides that "If it appears to a local authority that a smoke nuisance . . . exists on any premises occupied for the public service of the Crown, they shall report the circumstances to the appropriate Government Department. . . ." The justices, however, considered that they had jurisdiction, and made an order requiring the committee to abate the nuisance.

Held, that the Minister held the hospital in trust for the Crown, that the hospital management committee was carrying out his duties, and that, therefore, the hospital premises were premises "occupied for the public service of the Crown." The justices had, accordingly, been without jurisdiction. [D. C.]

COMMENTARY. The justices would, of course, have had jurisdiction if this case had arisen before the National Health Service Act, 1946, vested the hospitals in the Minister in trust for the Crown. The court expressed their regret that the cheap, quick and simple procedure of section 103 is no longer applicable to such a case.

It seems, though the court did not of course decide the point, that section 106 applies only to summary proceedings under the Act, and does not preclude the local authority from bringing an action for an injunction or the abatement of a nuisance.

Road traffic—*Driving tractor under age—Emergency Laws (Miscellaneous Provisions) Act, 1953*

WATTS *v.* BERRYMAN[14] (Q.B. Divisional Court: Lord Goddard C.J., Donovan and Havers JJ.: October 17, 1957).

A youth aged sixteen drove a motor-tractor along a road in order to get from one part of his father's farm to another part of the farm. On an information under section 9 of the Road Traffic Act, 1930, that he drove the tractor on a road when under the age of seventeen, the justices, being of opinion that the tractor was at the material time being used for the internal operation of the farm as provided for by the Emergency Laws (Miscellaneous Provisions) Act, 1953, Sched. I, para. 1, dismissed the information. On appeal by the prosecution:—

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[14] For the prosecution: *John Whitley* (instructed by Taylor, Willcocks & Co. for Bailey & Band, Newport, I. of W.). The defendant did not appear and was not represented.

Held, allowing the appeal, that although a person between the ages of seventeen and twenty-one might be able to take advantage of the Act of 1953, a person under seventeen was not permitted by section 9 (2) of the Road Traffic Act, 1930, to drive a motor-vehicle at all and, therefore, the defendant did not come within paragraph 1 of Schedule I to the Act of 1953, and an offence had been committed.

[J. D. Pennington, Esq., *Barrister-at-Law.*]

COMMENTARY. Section 9 (3) of the Road Traffic Act, 1930, prohibits persons under twenty-one years of age from driving certain heavy vehicles, including tractors, on roads. Schedule I, para. 1, of the Emergency Laws (Miscellaneous Provisions) Act, 1953, provides that section 9 (3) "shall not apply to a tractor used primarily for work on land in connection with agriculture."

Section 9 (2) of the Road Traffic Act, 1930, however, provides that "A person under seventeen years of age shall not drive a motor vehicle other than a motor cycle or an invalid carriage on a road."

Witness—*Evidence in rebuttal called after counsel had concluded their speeches but before summing-up*

R. *v.* FLINN [15] (Court of Criminal Appeal: Lord Goddard C.J., Gorman and Pearson JJ.: November 11, 1957).

F. was charged at quarter sessions with larceny from the person. F. set up the defence of an alibi and called a girl, P., to say that she was with him at a swimming-bath at the relevant time. After the speeches of counsel, but before the summing-up was commenced, the court adjourned until the following day. During the adjournment inquiries were made regarding the alibi and it was found that P.'s employer was prepared to say that P. was working during the whole of the time in question. The deputy chairman allowed the application by the prosecution to call this rebutting evidence and F. was convicted. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that this court had laid down in *R.* v. *Owen* (1952) 36 Cr.App.R. 16 that whether or not rebutting evidence should be called was a matter for the discretion of the presiding judge. Where an alibi had been set up and the details of the alibi made known to the prosecution for the first time at the trial, as in the present case, then as a general rule evidence showing that the alibi was incorrect ought to be admitted at a late stage. The judge at the trial had a discretion to admit such evidence up to the moment when the jury were enclosed for the purpose of considering their verdict. There was no ground for interfering with the exercise of that discretion in the present case. [H. P.]

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[15] For the appellant: *R. D. L. Du Cann* (instructed by Lincoln & Lincoln).

COMMENTARY. Compare *R.* v. *Wilson* [1957] Crim.L.R. 804, where a witness for the prosecution was allowed to be recalled after the jury had retired and the court quashed the conviction, even though the evidence given was irrelevant.

In *R.* v. *Owen* the court said it was too late to allow further evidence to be given after the summing-up is concluded. The dictum in the present case would seem to relax that rule somewhat, in permitting such evidence up to the moment when the jury are enclosed.

Acts and Orders *

British Commonwealth

COLONIAL PRISONERS REMOVAL (ANTIGUA AND MONTSERRAT) ORDER IN COUNCIL, 1957 (S.I. No. 1873); (ANTIGUA AND VIRGIN ISLANDS) ORDER IN COUNCIL, 1957 (S.I. No. 1874): both operative October 31, 1957. These Orders sanction the making of an agreement between the Colonies named in the respective Orders, for the removal of prisoners from Montserrat and the Virgin Islands to Antigua, and for their return.

TANGANYIKA (LEGISLATIVE COUNCIL) (AMENDMENT) ORDER IN COUNCIL, 1957 (S.I. No. 1875): operative, in part, November 6, 1957, as to the remainder on a day to be appointed by the Governor. The total number of members of the Legislative Council is increased and changes are made in the number of constituencies in the Territory by increasing them from nine to ten. Provision is made for the filling of certain seats in the Legislative Council by appointment instead of election where no candidates have been nominated for election. The maximum life of the Legislative Council is increased from three to five years; and the original Order in Council made in 1926 (S.R. & O. 1926, No. 991) is amended in some minor respects.

MEDICAL PRACTITIONERS (PROTECTORATE OF UGANDA) ORDER, 1957. See p. 61.

Food and Drugs

PRE-PACKED FOOD (WEIGHTS AND MEASURES: MARKING) REGULATIONS, 1957 (S.I. No. 1880): operative January 1, 1958. The Regulations of 1950 (S.I. 1950, No. 1125), as amended by similar Regulations (S.I. 1951, No. 996, and S.I. 1956, No. 1201; [1956] Crim.L.R. 704), are revoked and replaced with modifications. The principal alterations are (a) Poultry has been added to the list of pre-packed articles of food, listed in the Third Schedule, which, subject to certain limitations on the weight of the wrapper or container, may be marked with the minimum aggregate weight of the wrapper or container and the food therein; (b) the exemption from the Regulations of food pre-packed by a retailer for sale on his premises is limited to pre-packed in certain specified quantities; (c) the exemption from the Regulations of food sold in certain petty amounts no longer applies to articles of food specified in the Third Schedule, all of which, except poultry, are subject to the petty amounts provisions of sections 8 and 13 of the Sale of Food (Weight and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63); (d) the right to deliver pre-packed food unmarked, provided that an invoice or other document containing the requisite particulars is furnished to the buyer within fourteen days, is now only available to a person selling as a wholesaler; (e) the requirements with respect to the proper marking of wrappers and containers specified in the First Schedule have been reduced and simplified; (f) the Regulations do not apply to fish cakes, sausage rolls and water ices; nor do they apply to meat sausages which are not packed in metal, glass or rigid plastic containers.

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* Preparted by F. Maurice Drake, Barrister-at-Law.

The safeguards to traders contained in subsections (1), (2) and (3) of section 12 of the Sale of Food (Weights and Measures) Act, 1926, are applied to offences against these Regulations. These safeguards, together with the defences contained in the Food and Drugs Act, 1955 (4 & 5 Eliz. 2, c. 16) (in Scotland the Food and Drugs (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 30)), substantially correspond to those contained in the Order of 1950.

These Regulations apply to Great Britain.

For penalties for contraventions, see section 4 of the Regulations.

London

LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION REGULATIONS, 1957 (S.I. No. 1937): operative November 18, 1957. The Regulations of 1950 (S.I. 1950, No. 1571) and the amending Regulations set out in the First Schedule are consolidated with amendments. The principal changes are: (1) the appointment of the parking places in North Row and Savile Row, Westminster; Risinghill Street, Finsbury, Studley Road, Lambeth, Albion Way and Bonfield Road, Lewisham; Shrubbery Road, Wandsworth; and Gloucester Road, Reigate, is revoked; (2) the limits of certain parking places in Westminster, Lewisham, Paddington, Wandsworth, Woolwich, Beckenham, Dagenham, Wood Green, Thurrock and Woking are altered; (3) the permitted times during which vehicles may wait in parking places in Harpenden, St. Albans, Gravesend, Slough and Northfleet, are in several cases altered; and (4) new parking places are appointed in streets in Deptford, Lewisham, Stepney, Stoke Newington, Ealing, Enfield, Epsom, Gravesend, Guildford, Romford, Twickenham, Epping and Harpenden.

The following Order has been made detailing prescribed routes: S.I. No. 1960 (Wandsworth).

The following Order has been made detailing routes on which the 40 m.p.h. limit will apply: S.I. No. 2001 (Hammersmith).

Medicine

MEDICAL PRACTITIONERS (PROTECTORATE OF UGANDA) ORDER, 1957 (S.I. No. 1876): operative October 31, 1957. Under Part III of the Medical Act, 1956 (4 & 5 Eliz. 2, c. 76) medical practitioners with a recognised qualification in a Commonwealth or foreign country to which Part III applies may be registered in the United Kingdom as Commonwealth or foreign practitioners. Under section 19 of the Act a country may be declared a country to which Part III of the Act applies if Her Majesty in Council is of opinion that it affords just privileges of practising there to persons registered in the United Kingdom.

This Order declares Uganda Protectorate to be a Commonwealth country to which Part III applies.

Merchant Shipping

LOAD LINE (AMENDMENT) RULES, 1957 (S.I. No. 1797): operative October 29, 1957. The Load Line Rules, 1941 (S.R. & O. 1941, No. 1464) as amended (by S.R. & O. 1946, No. 1822; 1947, No. 772 and S.I. 1952, No. 1958) are further amended by deleting from the Assigning Authorities the British Corporation Register of Shipping and Aircraft (which has now been amalgamated with Lloyd's Register of Shipping), and by designating the British Technical Committee of the American Bureau of Shipping as an Assigning Authority.

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (No. 2) ORDER, 1957 (S.I. No. 1877): operative November 12, 1957. The following Portuguese possessions have accepted the Safety Convention: Cape Verde Islands; Portuguese Guinea; St. Tomé and Principé Islands; Angola; Mozambique; Portuguese India; Macao; Portuguese Timor.

MERCHANT SHIPPING (DEPARTMENT OF SCIENTIFIC AND INDUSTRIAL RESEARCH SHIPS) ORDER, 1957 (S.I. No. 1878): operative November 7, 1957. The Order of 1955 (S.I. 1955, No. 708; [1955] Crim.L.R. 445) is revoked and re-enacted with modifications made necessary by the passing of the Department of Scientific and Industrial Research Act, 1956 (4 & 5 Eliz. 2, c. 58).

Road Traffic

TRAFFIC REGULATION ORDERS (PROCEDURE) (ENGLAND AND WALES) REGULATIONS, 1957 (S.I. No. 1961): operative December 2, 1957. The Regulation and Restriction of Road Traffic (Procedure) Regulations, 1931 (S.R. & O. 1931, No. 486) in so far as they are still in force, and the similar permanent Regulations of 1934 are revoked and re-enacted with certain amendment. The main difference is that the new Regulations prescribe the procedure to be followed in connection with the making by local authorities under section 46 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43) of Orders regulating traffic on roads which by reason of subsection (3) of section 33 of the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67) do not require confirmation by the Minister of Transport and Civil Aviation.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

40. *Viewing the scene of the crime*

I am a clerk to a bench of country magistrates. This bench deals with a good many traffic offences over a wide area. One of the magistrates has approached me saying that he does not feel that he is as familiar with the roads in the farther part of this area from his home as he is with those near his home. He says that he would consider himself in a better position to adjudicate fairly if he could see beforehand the places where "incidents" have occurred. I can see no objection to this in principle if the police let me have merely a list of the places where the accidents or bad driving happened, and indications, if there is a road junction, of which roads at the junction were being used. I could then pass this on to the magistrate and he could inspect the sites a day or two before the court.

I shall be glad of your views as to whether this course might in any way be objectionable. [M. P. W.]

ANSWER

A magistrate is always at liberty to view the place in which an offence is alleged to have taken place if he feels that he will be able to appreciate the evidence better by so doing. Therefore, when, as must happen sometimes, he is already familiar with the place in question because it is in his home district, no objection to his exercising jurisdiction in the case can reasonably be taken on that account. So there is no logical reason why it should be considered wrong for him to go out of his way to make himself acquainted with other localities in his court area. He would have to be careful, however, not to assume that details of the landscape were unchangeable, and he should always check his mental picture by questions to witnesses. It is hardly necessary to add that he should make his observations without the police being present, so that no suggestion can be made that the prosecution have discussed a case with the magistrate before the hearing. [A. E. J.]

Letters to the Editor

Evidence at Quarter Sessions and Assizes

Sir,

In C. E. S. Horsford's clear and helpful article " Evidence at Quarter Sessions and Assizes " ([1957] Crim.L.R. 741) there is a passage relating to " Corroboration " on p. 748 which reads:

> " . . . and in dealing with the question of corroboration, it is the duty of the judge to point out to the jury the evidence which is capable of being regarded as corroboration in law, and it is then for the jury to decide whether or not such evidence does in fact amount to corroboration: *Tragen* (1956) Crim.L.R. 332."

I have not got access to a detailed report of *Tragen's* case but according to the report in (1956) Crim.L.R. at p. 332 it was held " that the function of the judge was to point out the evidence capable in law of being regarded as corroboration. It was then for the jury to decide whether or not this evidence amounted to corroboration." It is a little difficult to reconcile this case with what was said by the Court of Criminal Appeal in the case of *Zielinski* (1950) 34 Cr.App.R. 193 where Byrne J., delivering the judgment of the court, said at p. 197:

> " It is not, in the view of the court, the duty of the judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration, though judges frequently do so. Of course, if a judge points to a piece of evidence as being capable in law of amounting to corroboration and it turns out that it is not capable of amounting to corroboration then the conviction may be quashed; but there is no duty upon the judge to point out every piece of evidence which is capable of amounting to corroboration, providing he has sufficiently told the jury what in law is meant by corroboration."

An explanation is that where the judge has given the jury an adequate warning on corroboration *and* has properly directed them as to what corroboration means in law, then it is not necessary for him to specify to the jury what portions of the evidence can amount to corroboration (*Zielinski*); but where the judge has only given a warning to the jury on corroboration and has not gone on to explain what corroboration means in law, then it becomes his duty to point out evidence capable in law of being regarded as corroboration (*Tragen*).

Yours faithfully,
JOHN R. BLAGDEN.

Port-of-Spain, Trinidad, B.W.I.

[Mr. Horsford writes: " Certainly the judge is not required to point to every piece of evidence capable of being corroboration in law, but in addition to the usual warning and explanation of the law which he is bound to give, it is submitted that it is proper for him to point out the salient pieces of such evidence, if any, which the jury may consider. I agree that *Zielinski* emphasises the necessity for a proper warning and explanation of the law, which is more important."]

Books and Periodicals

Reviews:

The Offenders: Society and the Atrocious Crime. By Giles Playfair and Derrick Singleton. London: Secker & Warburg. 1957. 273 and (bibliography) 3 pp. (25s. net.)

This is an important book. Its concern is the relationship between crime and capital punishment: upon the examination of six criminal trials it builds a variety of arguments about and, generally, in support of the abolition of capital punishment, which deserve close attention. It is sufficient in a review to indicate that the authors take their stand upon three main propositions: first, " that all punishment by killing is wrong," secondly, " that abolition should not be fought for, as it mostly has been, merely as an end in itself, but rather as the first essential step in a programme of penal reform," and, thirdly, that the right approach to the problem of crime is " the clinical or curative approach."

It is suggested that the value of the book would have been increased by the addition of a chapter on psychopathology. Essentially the psychopathic state is the result of a disturbance of the social disposition: a baby abandoned on a Spartan mountain-top might grow up mad in some way, but it could not grow up a psychopath, because there would be no social *rapport* to be disturbed. The state seems to originate in unhealthy reactions to the difficulties of social adaptation in infancy and early childhood.

An exposition on these lines would have been helpful, first because it is not clear upon what conception of psychopathy Heath and Horston, to take two examples, are said to have been psychopathic, and secondly because it is upon the moral irresponsibility of the psychopath that some of the argument rests.

An interesting appendix on the 1957 Homicide Act includes the late Lord Cooper's canny approach to the mysteries of psychiatry: " We have a number of special defences, we have provocation, self-defence and all the rest of them, but when you begin to add to these a great many definitions descriptive of conditions described by Greco-Latin words we became perplexed and anxious." Although *psychopathy* has no Latin, we may hope that Lord Cooper's successors will not find this book all Greek. It deserves a better fate.

C. D. L. C.

The Sexual Offences Act, 1956. By C. Bruce Orr. London: Butterworth & Co. (Publishers), Ltd. 1957. xxiii and 152 and (index) 12 pp. (25s. net.)

We are continually being overtaken by events. No sooner has a kind legislature consolidated the statute law on sexual crimes than the Wolfenden Report bids fair to change it again. Not that an amending Act would be unwelcome: apart from the controversial changes which the Report might promote, some anomalies should be dealt with, *e.g.*, the wide difference in the maximum penalties for attempted rape on the one hand and attempted intercourse with a girl under thirteen, and unlawful sexual intercourse with a girl between thirteen and sixteen on the other. Again, the problem of what criminal sanction, if any, should be imposed on a woman who seduces a boy under the age of sixteen should be tackled.

For the present, Mr. Bruce Orr provides a useful reference volume to the 1956 Act: the Act is set out, preceded by a general introduction, accompanied by copious annotations and followed by a digest of cases and an index. Within the limits imposed by the size of the book requirements are met and guidance given: the partial remedy against lesbianism, for example, which exists under section 14 is carefully noted and *Hare* v. *Armstrong* digested accordingly. There is such an abundance of black type headings that the sections of the Act themselves do not stand out as clearly as they might.

C. D. L. C.

The Road Traffic Act, 1956. By Robert Schless. London: Butterworth & Co. (Publishers), Ltd. 1957. xiii and 140 and (index) 13 pp. (25s. 6d.)

The Road Traffic Act, 1956, amended and added to the law relating to road traffic in so many ways that a full exposition of the Act is a welcome sight. Mr. Schless provides a general survey, the text of the Act with annotations and an index. The Schedules are exhaustively annotated, Schedule 8, in particular, being all but submerged in a sea of cross-references. Where the Act of 1930 has been amended by the 1956 Act, the section in question is conveniently set out in full with the amendments taken in.

The notes plunge *in medias res*, whereas a brief statement of the effect of each section would have been helpful: the effect of section 29 (1), for example, is to provide a new defence to protect an employee who unwittingly drives a vehicle of his employer's which is not insured. The notes to section 8, which creates a new form of unlawful homicide, could usefully have included a reference to *R.* v. *Wilmot* and *R.* v. *Surrey Justices, ex p. Witterick.*

C. D. L. C.

Without My Wig. By G. D. Roberts, Q.C. London. Macmillan & Co. 1957. 280 and (index) 6 pp. (25s. net.)

This book is largely concerned with sport. Much of it is devoted to rugby football and some to tennis and golf. For those who would like to have read of "Khaki" Roberts' life in the law there is little except the most interesting chapters on the Nuremberg Trials. The book is worth reading for those alone.

The Editors of Archbold will be grateful for having their attention drawn to the omission from that book of reference to *R.* v. *Beecham* [1921] (not (1921)) 3 K.B. 464 on the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

It is to be hoped that the author will write a companion volume, *With My Wig*, giving us something of his forensic triumphs and disasters.

P. A.

Prisoners at the Bar. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 288 pp. (30s. net.)

Enemies of the State. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 299 pp. (30s. net.)

Guilty or Not Guilty? Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 287 pp. (30s. net.)

They Escaped the Hangman. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 301 pp. (30s. net.)

For many years there have been published in this country series dealing with well-known trials. We now have a series with the title "Notable American Trials" dealing with a number of famous cases from America. The first four volumes have been published in this country and are a welcome addition to libraries, both private and public, containing accounts of famous criminal cases.

The style is not the same as that used in the English series in that each book is not devoted to one trial but contains accounts of four trials. There is factual account followed by the evidence given at the trial, the final speeches of counsel and then the verdict and any aftermath.

These first four volumes have been prepared by Mr. Francis X. Busch.

Of the sixteen cases in these volumes only a few deserve particular mention. In *Prisoners at the Bar* there is an account of the Loeb and Leopold case, where two youths killed a small boy in particularly revolting circumstances. What will strike the English lawyer is the extreme verbosity of counsel. Mr. Clarence Darrow pleads on behalf of the two youths against a sentence of death; in order to do this he speaks for twelve hours, addressing the judge as though he were a jury and giving a lecture on the principles of punishment. One can only hope that this is not typical of advocacy in American criminal courts today. In the Bruno Hauptmann case the whole story is graphically told and the evidence identifying the wood from which the ladder used in the kidnapping of the child was made shows a magnificent piece of detective work. This book is worth reading for the account of this case alone.

Mr. Busch in *Enemies of the State* considers the trials of Mrs. Surratt for the murder of Abraham Lincoln, and of Albert Fall, who was Secretary of the Interior and bartered away the naval oil reserves for insignificant sums, the Al Capone trial for income tax frauds and finally the Rosenberg case. The last two will be well known to many English readers and the Rosenberg case in particular is an outstanding example of the many legal ways in which a sentence of death can be postponed in the United States.

Guilty or Not Guilty contains an account of the much criticised Alger Hiss trials. This case and other recent cases contain less of the method of advocacy indulged in in earlier trials where savage attacks are made by counsel on each other; thus in the D. C. Stephenson case defence counsel are charged with having "blood money jingling in their pockets."

The only non-murder case in *They Escaped the Hangman* is a treason trial—the Hans Haupt case—a somewhat half-hearted attempt at spying by Germans landed by submarine in America. Also contained in this volume is the Caleb Powers case. Powers was four times on trial as accessory to a political murder, he was thrice convicted by picked juries. On the fourth trial the jury disagreed and Powers eventually obtained an unconditional pardon after being, for over eight years, "a prisoner without legal conviction." P. A.

My Son's Execution. By W. G. Bentley. London: W. H. Allen. 1957. 175 pp. (12s. 6d. net.)

This book ought never to have been written. The rewriting of the story of the murder of a policeman in the execution of his duty by two youths, by someone who was emotionally involved, can serve no useful purpose. However sincere, sentiment has no place in the question of capital punishment. A. L. N.

Prisons I Have Known. By Mary Size. London: Allen and Unwin. 1957. 195 pp. (18s. net.)

This book readily divides itself into two parts. The first half is a factual account of a life-time in the prison service, enlivened by short case-histories of some of the prisoners. One can imagine being enclosed in those chilly surroundings which deaden the soul and seem to produce, as Miss Size points out, only boredom, disgust, ugliness and humiliation. After knowing all sorts and conditions of women, Miss Size tells us that in what are reputed to be the worst of them, she found that spark of affection and gratitude which, if it had been properly developed early in life, might have saved many women from a career of crime.

In 1947, Miss Size was recalled from retirement to become the governor of Askham Grange, the first non-security prison for women. In the second half of her book she gives a cheering account of training in open conditions. She explains that the number of women who need a high wall around them as a protection to society is not great. The secret of success lies in dealing in small numbers.

Sometimes this book seems a little superficial, because Miss Size writes in such matter-of-fact language. Yet it is one to be strongly recommended, particularly to those who do not yet agree with Miss Size that "Reform is a journey, not a destination."

JEAN GRAHAM HALL.

Books Received:

The Medical Murderer. By Rupert Furneaux. London: Elek Books. 1957. 159 pp. (16s. net.)

Road Transport Law. Eleventh edition. By L. D. Kitchen, revised by E. K. Wenlock. London: Iliffe & Sons. 1957. 123 and (index) 9 pp. (13s. 6d. net.)

Villainy Unlimited. By Derick Goodman. London: Elek Books. 1957. 234 pp. (18s. net.)

Readers' Digest:

Larceny: Larceny by a trick and false pretences: 121 *Justice of the Peace* 736, 752, 769.

Homicide: Homicide and Abortion in England and Ireland: 84 *Journal of Criminal Law* 362.

Homicide: *R.* v. *Vickers*: 20 *Modern Law Review* 633.

THE
CRIMINAL LAW
REVIEW

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Editorial

The Court of Criminal Appeal

We should like to draw the attention of our readers to a leading article in *The Times*, December 19, in which Dr. Glanville Williams appraises the achievements of the Court of Criminal Appeal during its fifty years of life.

We cannot but endorse his views with regard to the court. At this stage in its existence it seems appropriate to extend to the court the powers of ordering new trials, hearing appeals where fresh evidence comes to light, and awarding compensation to victims of mistaken convictions, which are features of most Continental systems of criminal appeal. A further criticism is that the judges have deliberately refused to upset convictions on questions of fact except in very rare cases. It is pointed out that there is no question here of undermining the position of the jury as a safeguard of innocence, and, if that is so, the principal objection to upsetting a conviction on facts is gone.

The court's many notable contributions to the law of evidence and procedure are deserving of much praise, although we cannot be surprised by this when we consider the personal work of the heavily over-burdened judges of the Queen's Bench Division who make up the court.

Gas meter thefts and gas poisoning

On January 16 a man was charged at Paisley Sheriff Court with causing the deaths of two people. The charge arose from the deaths of a man and his baby daughter from gas poisoning, the gas having escaped from a fractured gas pipe after thieves had stolen the gas meter. The facts give rise to some interesting speculation as to what charges could have been brought had the crime taken place in England and not, as in fact happened, in Scotland. We are indebted to Professor J. C. Smith of Nottingham University for his assistance in formulating the problem for us as it appears in English law.

The accused could be convicted of the felony of unlawfully and maliciously administering coal gas, so as to endanger life, under section 23 of the Offences against the Person Act, 1861, only if it could be proved that he foresaw, when taking the meter, that the administration of coal gas with consequent injury to someone was likely to result. The jury would have to be satisfied that there was actual foresight and it would not be enough to show only that a reasonable man, in the position of the accused, would have foreseen such consequences.[1]

The accused might, however, be charged with manslaughter. According to Mr. Turner it would still be necessary to prove that the accused realised that his act " would or might cause someone a physical harm but not a fatal harm." [2] Mr. Turner takes the view that it is " now beyond all question " (Kenny, 145) that negligence will not suffice for manslaughter. According to this view, it would be necessary to prove the same *mens rea* as for the felony under section 23.

Dr. Glanville Williams, on the other hand, is of the opinion that manslaughter can be committed by inadvertent negligence,[3] but that the negligence must be as to death, and that negligence as to injury short of death will not suffice. If this is the rule, it would be enough to prove that *a reasonable man* in the position of the accused would have foreseen that the act was likely to result in the administration of coal gas to someone, and his consequent death. This view produces the anomalous result that it would (theoretically, at least) be easier to get a conviction for manslaughter (punishable with life imprisonment) than for the felony under section 23 (punishable with ten years' imprisonment). It is nevertheless submitted, with respect, that this view is the better supported by the authorities.

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[1] *R.* v. *Cunningham* [1957] Crim.L.R. 326, 473 and commentaries thereon.

[2] Kenny, *Outlines of Criminal Law*, p. 146; *cf.* Russell on *Crime*, pp. 643, 647.

[3] *The Criminal Law, The General Part*, § 29.

It is possible that a conviction might also be supported under the doctrine of constructive manslaughter. The Homicide Act, 1957, abolishes the rule that death caused in the course or furtherance of a felony is murder. The Act does not, however, say that such killings are not necessarily crimes at all. It is not improbable, therefore, that deaths so caused might now be held to be manslaughter.[4]

The use of insulin in criminal cases

The use of insulin in criminal cases, and in particular murder, has been visualised in the forensic science field for some time. Some persons even believed that its successful use would give " the perfect murder."

The case of *R.* v. *Barlow* reported in *The Times,* December 10–14, 1957 shows clearly the necessity for a pathologist with a wide experience in the forensic field. A knowledge of the occupation of the husband and his available resources, and an extremely careful post-mortem examination which revealed several puncture marks!—death in bath by drowning?—was this latter a diversion?

Dr. Price, the pathologist, believed the insulin to be the fundamental so that, with the assistance of the industrial scientist engaged in the manufacture and the standardisation of insulin, he ultimately clinched the matter that insulin itself had actually been used.

[J. B. F.]

Parliament

Road transport lighting

The Road Transport Lighting (Amendment) Bill has been read a second time in the House of Commons and has been committed to a Standing Committee (H.C. Debates, Vol. 579, col. 866, December 6).

Indecent assaults on children

Mr. R. A. Butler, the Home Secretary, said that the point to which Lord Goddard C.J. drew attention in *Williams* v. *Gibbs* (*post,* p. 127) has been noted for legislation when the opportunity occurs, but that it is not possible to say when this might be (H.C. Debates, Vol. 580, col. 99, December 19).

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[4] *Cf.* 9 *Cambridge Law Journal* 154, 158.

Judicial appointments

His Honour Judge Geoffrey Walter Wrangham, Mr. Herbert Edmund Davies, Q.C., and Mr. Richard Everard Augustine Elwes, O.B.E., T.D., Q.C., have been appointed judges of the High Court of Justice.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Interpretation of Statutory Powers of Arrest Without Warrant

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

Both the police and private persons have certain statutory powers of arresting even for misdemeanours and summary offences. It is the purpose of this article to consider the principles applied by the court in their interpretation.

The presumption in favour of liberty

In construing Acts of Parliament the courts sometimes apply a presumption in favour of liberty, preferring where possible an interpretation which preserves the liberty of the subject. An Irish judge once expressed the opinion that this presumption applied to statutes authorising arrest, so that such statutes must receive " strict construction " in favour of liberty.[1] It may be doubted whether this opinion is correct. The presumption may properly be applied to some statutes dealing with other subjects, where it seems to secure what would probably have been the intention of Parliament. But in statutes relating to arrest, Parliament has expressly dealt with the problem of liberty and endeavoured to effect a reconciliation between the opposing values of liberty and public order. Such statutes should be construed in the way that seems best to accord with the intention of the legislature, and it does not follow that every question of doubt must be resolved in favour of the suspect and against the arrester.

Who may arrest

Statutory powers of arrest are given sometimes to constables, sometimes to other officers, sometimes to private persons.

Where the power is given to a constable, need he be on duty at the time when he exercises it? The Municipal Corporations Act, 1882, s. 193, expressly requires him to be on duty when acting under that section ; but most statutes are silent on the question. It seems that under these other statutes a constable may exercise his powers although he is not on duty.

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[1] *Barry* v. *Midland G. W. R.* (1867) I.R. 1 C.L. at 141, *per* George J.

The powers of constables are given to some persons who are not regular constables. For example, some servants of the Railway Executive (formerly the railway companies) are made special constables, and there are private Acts giving them special powers. Park keepers are by certain local statutes given the powers of police within the park.

Must the offence have been committed, or is reasonable belief sufficient?

The courts have vacillated on the question whether a statutory power to arrest for offences presupposes that an offence has been committed, or whether, on the other hand, reasonable suspicion is enough, though the suspect should ultimately prove to be innocent. This question is not of great interest to the policeman in the performance of his duties, for he must necessarily act on his reasonable belief at the time, leaving any legal issues to be argued afterwards by lawyers if legal proceedings should be taken. If such proceedings are taken, both justice to the individual officer and a due regard for the public interest would seem to suggest the rule that the arrest is lawful even though it should afterwards transpire that the suspect is innocent. The legality of the arrest should be judged on the facts as they reasonably appear to the officer at the time. Yet it cannot be said with confidence that this is invariably the law.

Perhaps the earliest case is *Hanway* v. *Boultbee* (1830) 1 M. & Rob. 15, which arose under a provision now represented by section 61 of the Malicious Damage Act, 1861, empowering the arrest of those "found committing" an offence against the Act. Tindal C.J. there ruled that the offence must actually have been committed, with the requisite "malice," or else the arrest was unlawful. The same interpretation was adopted by the Court of Exchequer in *Parrington* v. *Moore* (1848) 2 Ex. 223. These were, however, civil actions against the person arresting, not criminal prosecutions for assault or false imprisonment. It would seem a tenable view that on a criminal charge against the officer, his belief that the person arrested was guilty would exclude *mens rea*, and so would be a defence; and it should be so even though the belief was unreasonable. The fundamental difference between criminal and civil responsibility would seem to justify this difference, for whereas mistake is generally no defence to an action for a tort, it is generally a defence to a criminal prosecution, because it excludes the requisite *mens rea*.

There is authority for saying that, even in tort, a reasonable belief that the person apprehended was guilty may suffice to bring the arrest within the protection of a statute. In *Downing* v. *Capel*,[2] where the arrest was under section 103 of the Larceny Act, 1861 (another " found committing " section), Keating J. said that " it is sufficient, if the person apprehended has been seen in a position which justified the belief that he had committed the offence." Similarly in *Griffin* v. *Taylor*,[3] although the immediate question was as to notice of action (a requirement since abolished by 56 & 57 Vict. c. 61), some expressions in the judgment seem to support the view that belief in the commission of the offence is enough to justify arrest. These opinions are, therefore, contrary to *Hanway* v. *Boultbee* and *Parrington* v. *Moore*.

The four cases usually discussed on the question are *Trebeck* v. *Croudace*,[4] *Isaacs* v. *Keech*,[5] *Ledwith* v. *Roberts*,[6] and *Barnard* v. *Gorman*.[7]

In *Trebeck* v. *Croudace*, the question arose under the Licensing Act, 1872, s. 12, which gave power to arrest " every person who is drunk in charge of any carriage." In an action for false arrest, the Court of Appeal held that an honest and reasonable belief justified the arrest, for instant arrest was necessary to avoid danger to life and limb. The court refused to be influenced by the fact that some statutes allowed arrest for reasonable belief in express terms. Bankes L.J. said:

> " Who is it that the legislature intends to be the judge of what the circumstances are such as to call for an arrest? Surely it must be the person who is called upon to act upon such information as is available to him at the moment, and not some judge or jury at some later time upon matters of which the person making the arrest had not only no knowledge but no means of knowledge."

In *Isaacs* v. *Keech* a woman was arrested under the Town Police Clauses Act, 1847, s. 28, under the mistaken belief that she was a prostitute who was importuning. A Divisional Court, consisting of two Lords Justices of Appeal, again held the arrest legal, following *Trebeck* v. *Croudace*. It made no difference that the statute considered in the latter case said " may " arrest while that in *Isaacs* v. *Keech* said " shall " arrest. At this date the courts were evidently prepared to establish a general rule of construction of statutory powers of arrest, that such powers extended to all cases of reasonable suspicion.

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[2] (1867) L.R. 2 C.P. 461.

[3] (1876) 2 C.P.D. 194.

[4] [1918] 1 K.B. 158.

[5] [1925] 2 K.B. 354.

[6] [1937] 1 K.B. 232.

[7] [1941] A.C. 378.

A reaction to the stricter view came with *Ledwith* v. *Roberts*. Greene L.J. in that case wished to confine the rule in *Trebeck* v. *Croudace* to those statutes in which the object of the legislatuure must have been to provide for acts " where, in the interests of public safety, or where danger to life or limb or property is threatened, prompt action is called for." But it is difficult to see how this is any substantial restriction, for in every instance in which the legislature has given a power of summary arrest it must have thought that prompt action was called for in the public interest. Otherwise the power of summary arrest would not be needed, for if time permits it is always possible to obtain a warrant. Greene L.J. proceeded to doubt the decision in *Isaacs* v. *Keech*, but his remarks on the whole subject were *obiter*.

The decision of the House of Lords in *Barnard* v. *Gorman* constitutes the most authoritative pronouncement on the subject. This case turned on the power of arrest given by a section of the Customs Act then in force. Viscount Simon L.C. in the leading speech left open the question whether there is a general principle of construction applicable to all statutes giving a power of arrest, but held that the section in question on its true construction was intended to give a power to arrest on reasonable suspicion. He went on to express a wider opinion in what was confessedly an *obiter dictum*. " My own view is that, when the question arises whether a statute which authorises arrest for a crime should be construed as authorising arrest on reasonable suspicion, that question is to be answered by the contents of the particular statute concerned rather than by reference to any supposed general rule of construction."

The main reason given by the House of Lords for the wider construction of the particular section was that it contained the words " the offender may either be detained or proceeded against by summons." Since it was clear that the second alternative covered not only actual offenders but alleged offenders (for the whole object of proceeding by summons is to ascertain whether a man is guilty), their Lordships were of opinion that the first alternative must do so likewise. Lord Wright said: " I think it impossible to construe ' offender ' otherwise than as having one and the same meaning in this short sentence."

This reasoning, though superficially attractive, is, when closely considered, not altogether cogent. The power to prosecute avails against anybody, whether guilty or not and whether reasonably believed to be guilty or not. If the defendant is innocent he will be acquitted, and if the prosecutor did not reasonably believe him to be guilty the prosecutor may be liable in tort for malicious prosecution; but in any event the prosecution itself will be a valid legal proceeding, which will put the defendant to answer. On the other hand the power to arrest is confined to those who are guilty or are reasonably suspected to be guilty, because in an action in tort for wrongful arrest an unreasonable suspicion would be no defence. Thus, even on the construction adopted by the House of Lords, it is not true to say that the word " offender " bears the same meaning in relation to the power of arrest and the power to proceed against by summons. In relation to the power of arrest it does not cover those unreasonably suspected; in relation to the power to proceed by summons it does. This difference of meaning does not appear from the words of the Act; it is the result of judicial notions of policy which are fastened upon the Act *ab extra.* The reason for restricting the power of arrest is simply that it would be too great an interference with the liberty of the subject if a person unreasonably suspected of an offence could be arrested without any remedy in damages. This principle was not expressed in the Customs Act. Yet Viscount Simon thought that all he was doing was to " take the words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act."

That there is in truth no impossibility in attaching different meanings to a word or phrase in the course of the same sentence may be further exemplified from the Army Act, 1881, s. 158. This begins: " Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he . . . has ceased to be subject to military law." In *Marks* v. *Frogley*,[8] the Court of Appeal held that the concluding words were not limited to the case where an offence had in fact been committed, but that the power of arrest and prosecution applied where an offence was alleged to have been committed. Otherwise, said Chitty L.J., the section would not only be reduced to a palpable absurdity but would be rendered meaningless. " In some impossible manner it must be shown that the offence has been committed by the person before he can be put upon his trial for the offence. It is manifest that the words 'alleged to have been committed' must be read into the condition [imposed by the opening words] in order to give it any meaning at all." Yet even this is too simple a construction, for its literal result is to allow not merely the arrest and prosecution but the *punishment* of one who is merely alleged to have committed an offence. Clearly, the power of punishment applies only to those who are proved in court to have committed the offence, so that in this respect the opening words must be read literally. It is satisfactory to say that the allegation of an offence should empower prosecution; but in an ordinary statute relating to civilians it would not be satisfactory to say that an unreasonable allegation should justify arrest. (That this construction is placed upon the Army Act results partly from other sections of the Act and partly from a general principle of law relating to military discipline.) Thus in an ordinary statute the same words in a single sentence may be held to have three meanings in three different applications: as to arrest, they may be held to refer to reasonable suspicion; as to prosecution, to any allegation; and as to punishment, to proof of the offence. This diversity of interpretation results not from the words of the statute but from the fundamental policy of the law.

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[8] [1898] 1 Q.B. 888 at 899, 904.

If, then, it be conceded that policy can enter into construction, the opinion of Bankes L.J. is extremely persuasive, that as a matter of general principle a statute giving power to arrest for crime should be construed as extending also to give a power to arrest those reasonably suspected of crime, without searching the statute for indications of a parliamentary intention to this effect. The opinions expressed against this view in *Barnard* v. *Gorman* were not necessary for the decision and were *obiter*. A rule excluding the defence of reasonable suspicion is inconsistent with the object of giving the power of summary arrest, which is to enable the police to act on the instant where this is necessary to prevent the escape of the suspect. It is not possible in such circumstances to make the full inquiry that will afterwards be undertaken in court.

Some remarks may here be added on the speech of Lord Wright in *Barnard* v. *Gorman*. He doubted *Isaacs* v. *Keech*, because he thought that the statute there considered involved " an overriding condition that the person arrested should answer to a general description," *viz.*, of being a common prostitute and of loitering and importuning. For this view, Lord Wright relied on *Bowditch* v. *Balchin*,[9] a case under the City of London Police Act, 1839, s. 18, which empowered a constable to arrest " all loose, idle and disorderly persons . . . whom he shall have good cause to suspect of having committed " an offence. The decision was that a person could not be arrested under this section merely because he was reasonably suspected of an offence; he had also to fall within the class of " loose, idle and disorderly persons." However, nothing was said in *Bowditch* v. *Balchin* on the question whether it might not be enough to show reasonable suspicion that the person arrested was loose, etc. The constable in the particular case did not allege or prove such a suspicion, and it was not considered by the court. In this respect, Lord Wright's version of the case is somewhat misleading, because he said: " It was contended there that it was enough if the constable had good cause of suspicion, even though the man arrested did not come within the specified category of persons," and this contention was rejected. But the actual contention in *Bowditch* v. *Balchin* was that the words " loose, idle and disorderly persons " were not controlling, and that the only issue was whether the constable had good cause of suspicion (not that the accused was loose, etc., but) that he had committed an offence. It was this contention that was rejected.

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[9] (1850) 5 Ex. 378.

Lord Wright was prepared to approve *Trebeck* v. *Croudace,* partly because " there was there no overriding condition that the person arrested should answer to a general description. The power to arrest depended on the particular acts done or conduct exhibited." Yet he thought that in *Isaacs* v. *Keech,* the question whether the woman was loitering and importuning should have been regarded as a condition that had to be satisfied before the power to arrest arose. It is hard to see why loitering and importuning is not just as much a " particular act done or conduct exhibited " as is being found drunk in charge of a carriage.

This variety of opinion and argument makes the law very complicated.

Whatever view may be taken on the general question, Parliament has approved the construction placed upon the Customs Act in *Barnard* v. *Gorman.* For, in the statute now ruling on the matter, the Customs and Excise Act, 1952, the power to arrest is expressly extended to cases where there are reasonable grounds to suspect an offence (s. 274 (1)).

The general question is still open for final decision by the House of Lords. It is conceived that *Isaacs* v. *Keech,* though much shaken by subsequent comments, is still an authority controlling the interpretation of the Town Police Clauses Act, and will remain so until such time, if ever, as it is overruled by the House of Lords. On the other hand Hallett J. ruled that, having regard to the comments in *Ledwith* v. *Roberts,* the power of arrest given in section 6 of the Vagrancy Act, 1824, does not extend to arrest on reasonable suspicion.[10] The facts of the case before Hallett J. showed strikingly the injustice to the police caused by this narrow interpretation. The learned judge animadverted strongly upon the state of the law, which he thought very greatly fettered the police in performing their duty of protecting the public. The restriction upon the power of arrest under the Act is all the more striking, and anomalous, because the Act imposes a positive duty on the police to arrest those found offending. It is an ancient principle that a duty to arrest implies a power to arrest on reasonable suspicion, for otherwise the officer is placed in a most unfair dilemma. He can only perform his duty on the facts as they appear to him, and if he does that he should be protected.

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[10] *Stevenson* v. *Aubrook* [1941] 2 All E.R. 476.

The Canadian Criminal Code, s. 648 (1), which empowers a police officer to arrest without warrant anyone whom he finds committing any criminal offence, was at first interpreted to mean that the offence must actually have been committed.[11] More recently, however, a judge of British Columbia has held, after a full examination of the English cases, that the section may be construed as extending to arrest on reasonable suspicion, where the offence suspected is of such a nature as to call for prompt action.[12] He further held that even if he were wrong on the point of construction, the arrest was validated by another section, section 30. It would be a great advantage if a provision similar to section 30 of the Canadian Code were enacted in England.

The reasonableness of the suspicion

Where reasonable suspicion justifies arrest, the question what inquiries should reasonably be made may depend on the situation contemplated by the Act. Under the Pawnbrokers Act, 1872, a pawnbroker may, on an article being offered in pawn, arrest the offeror where he suspects that it has been stolen. It has been held that the pawnbroker is entitled to proceed on the facts as he sees them at the time, and is not bound to verify an improbable explanation given by the offeror: "the moment of reasonable suspicion under the Act is the moment when the article is offered in pawn." [13]

The issue of reasonable belief pertains only to questions of fact, not to questions of law. It is no defence to the officer that he believed the suspect to have committed an offence, if he knew all the facts and was mistaken only as to the legal existence or extent of such an offence.[14]

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[11] *Bottley* [1929] 3 D.L.R. 766; 2 W.W.R. 76; 51 C.C.C. 384; 24 Alta L.R. 43.

[12] *Leighton* v. *Lines* [1942] 1 D.L.R. 568; 1 W.W.R. 201; 77 C.C.C. 264; 57 B.C.R. 232.

[13] *Howard* v. *Clarke* (1888) 20 Q.B.D. 558 at 563, *per* A. L. Smith L.J.

[14] *Frey* v. *Fedoruk* [1950] S.C.R. 517; 3 D.L.R. 513; 97 C.C.C. 1; 10 C.R. 26.

Unreasonable but correct suspicion

An officer may make an arrest on a suspicion that is unreasonable at the time but that proves in the event to be justified. Whether such "second sight" is permitted in arresting under statutory powers may depend on the wording of the statute. Sometimes the statute gives power to arrest where the offence in question is actually committed, and here there would seem in principle to be no difficulty in holding, according to the literal words of the statute, that the officer is justified by the event however unreasonable his suspicion was at the time of arrest. Even if such a statute is read as justifying arrest on reasonable belief, there is no reason for denying it in addition its literal meaning. Thus, under such a statute the power of arrest may be a double one, to arrest either when the offence has actually been committed or when it is reasonably believed to have been committed. Some statutes are expressly worded according to this double formula, such, for example, as the Diseases of Animals Act, 1950, s. 73 (1).

The chief difficulty is with those statutes, such as the Protection of Animals Act, 1911, s. 12 (1), which give power to arrest only a person whom the officer arresting has reason to believe is guilty of an offence under the Act. Such a wording seems on its face to exclude the possibility of "second sight."

The extreme subtlety that may result from an over-literal interpretation of statutory powers may be illustrated from the Official Secrets Act, 1911, s. 6. This enables anyone to arrest a person who is found committing an offence under the Act, or who is reasonably suspected of having committed, or having attempted to commit, etc., such an offence. This envisages three situations. If the substantive offence is still in the stage of attempt, an arrest is valid if the person arrested is reasonably suspected of the attempt; nothing is said of an unreasonable but correct suspicion ("second sight"). The same applies where the arrest is for a crime that is over, if the arrest is by one who did not find it being committed. If the arrest is by one who found it being committed, he is empowered to arrest whenever his suspicion is correct, whether it is a reasonable suspicion or not. Nothing is said here on the legality of arrest on reasonable but unfounded suspicion.

By the Official Secrets Act, 1911, s. 7, a person who attempts an offence against either Act is made guilty of an offence, and the two Acts are required by section 11 to be read as one. Hence a person who is found attempting an offence is found committing the offence of attempt, and may be arrested even though the arrester's suspicion was unreasonable.

The net result seems to be this. A person who finds an offence under the Official Secrets Acts being committed or attempted may arrest, and so may a person who reasonably believes that an offence has been committed or attempted. But a person who does not find an offence being committed or attempted is perhaps not justified in arresting if, although he suspected that an offence was committed or attempted, and although his suspicion was correct, it was an unreasonable suspicion on the facts as he knew them. It can hardly be thought that Parliament intended this distinction, but it can be avoided only by an extensive interpretation of the words of the section. The common-sense solution would be to read this and every other statute empowering arrest on reasonable suspicion as empowering also arrest on well-founded suspicion whether reasonable at the time or not.

The constable's discretion

It was pointed out in a previous article ([1954] Cr.L.R. 408) that a constable is not bound to exercise his common-law power of arrest for felony. Still less is he under an inflexible duty to exercise his great statutory powers of arresting for misdemeanour. These powers, which are nearly always given in permissive, not mandatory, terms, must be used with restraint and discretion, for otherwise, as Scott L.J. remarked, they would become a danger to the community instead of a protection. The Royal Commission on Police Powers regarded it as accepted police practice at the present day that " even where a power of arrest without warrant exists, the arrest of an offender is always to be avoided if a summons will suffice." Goddard L.J. regarded a summons as " the proper course to take in the case of misdemeanours or summary offences unless, where there is power to arrest, there is reason to believe that a summons would not be effectual."[15] Although he confined this remark to offences below the degree of felony, it would seem that arrest should also be avoided where possible for less serious felonies, such as a minor larceny where there are such circumstances of mitigation that it is clear that prison sentence would not be imposed. The relevant questions are: has the accused a fixed abode; if so, are his name and address known, or can they be discovered without making an arrest; and is it unlikely, having regard to the nature and circumstances of the charge and the character of the accused, that he will fail to answer a summons? If all three questions are answered in the affirmative, an arrest is generally improper, even though technically legal. There may, however, be some exceptions to this proposition, as where it is essential to arrest the accused in order to prevent him from warning others who are implicated. An arrest for the purpose of questioning the accused would certainly be improper, however great the temptation upon the police to resort to it.

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[15] *Dumbell* v. *Roberts*, 113 L.J.K.B. 185.

These considerations are matters of policy, propriety and social manners rather than of law. In some American states it is provided by statute that an arrest without warrant even for felony is invalid unless the officer has reasonable ground to believe that the suspect may escape unless immediately arrested. In England there is no such general requirement as a matter of law, and Parliament has frequently given the power of summary arrest for quite trifling offences, such as (in the Metropolis) restricting the thoroughfare with a carriage, without attaching as a condition that the case must be inappropriate for a summons. Some statutes, however, confer a power of arrest only where the name and address of the offender are unknown and cannot then be ascertained by the officer; if an officer purports to arrest under such a statute without making inquiry as to the offender's name and address, the arrest will be illegal.[16]

A few statutes preserve for limited purposes the ancient duty to arrest. Thus the Sheriffs Act, 1887, s. 29 (1), makes it a misdemeanour for a sheriff to refuse to arrest a felon. This is hardly capable of raising a question at the present day; but the same cannot be said of the Vagrancy Act, 1824, which confers powers of arrest upon private persons as well as upon the police, and provides, in sections 6 and 11, that a constable shall be under a duty to receive a person arrested from a private arrester and also to make arrests himself of persons found offending against the Act. This seems to give him no discretion, though in many offences under the Act the name and address of the offender will be known and there will be no practical necessity for making an arrest. According to the literal words of the Act, a person of ill repute could formally arrest the Prime Minister or a High Court judge on a charge under the Act, and then peremptorily require a constable to receive him into custody. The danger has been seen by Parliament, but, strangely, rectified only for one particular type of case. By the Criminal Justice Act, 1948, s. 68, a fortune teller or palmist found offending under the relevant provision of the Vagrancy Act can only be arrested by a constable, and only if he believes that the offender will abscond or is not satisfied as to his identity or residence. For all other offences under the Vagrancy Act, the wide powers and duties of arrest under that Act remain untouched.

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[16] *Dumbell* v. *Roberts*, above.

A similar problem arises under the Highway Act, 1835, s. 78, which declares that any person who sees an offence committed under the section not only may but shall arrest. It would seem that, strictly speaking, one who fails to arrest under the section would be guilty of a misdemeanour. Duties to arrest are also placed upon persons to whom property is offered to be sold, pawned or delivered, if he has reasonable cause to suspect an offence under certain Acts with respect to such property (Larceny Act, 1861, s. 103; Public Stores Act, 1875, s. 12; Army Act and Air Force Act, s. 156 (4); Larceny Act, 1916, s. 41 (2)). In practice, prosecutions are not brought for neglect of the duty.

[*To be continued*]

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1958

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

Taking and Driving Away

For quite twenty seconds the court room presented a very unusual spectacle: nothing was happening. The two men standing rather apathetically in the dock had been introduced by P.C. Mure, the assistant gaoler, as George Ferme and Horace Old and then the machinery of justice had come to a standstill.

"Where's the officer in charge of the case?" snapped Frell, the clerk, when it became apparent that nobody was coming forward to occupy the witness box. Mure disappeared through the door leading to the gaoler's domain and his voice could be heard calling loudly "Officer in Ferme and Old. Officer in Ferme and Old." A titter from the more quick witted members of the public at the back of the court room would have developed into a laugh if Sergeant Quing, the warrant officer, had not promptly made it plain that audible demonstrations of a sense of humour were a breach of etiquette.

A swing door burst open abruptly to admit a smartly dressed young man, looking very discomposed; he scurried round behind the dock and into the witness box. " I beg your pardon, your worship," he said rather breathlessly to Mr. Sutterthwick. " I was engaged on the telephone." He knew how inadequate it would sound as an excuse for wasting precious moments of the day's ration of time for trying cases, but he did not want to disclose publicly that he had been called urgently by a " nose " who had some valuable information to impart.

" Is this a case you are asking the magistrate to deal with ? " asked Frell, after a short pause to allow the silent reproof of the court to take effect.

The officer agreed that it was.

Preliminary

" There is one charge against you both of attempting to take and drive away a motor-vehicle without the owner's consent or any lawful authority " began Frell, addressing the two prisoners.

" That's the second charge in my register," interrupted Mr. Sutterthwick, " The first charge is actually taking and driving away."

" Yes, sir," said the clerk patiently, " but if they don't consent to be dealt with summarily on the attempt it will be more convenient to proceed with the first charge as an indictable offence too. It's both indictable and summary."

" I see," said the magistrate, not very convinced, and reached for *Stone* but then changed his mind.

Frell proceeded to expound to the men in the dock their right on the second charge to be tried by a jury, and the possible consequences of being convicted by the magistrate if they accepted summary jurisdiction. Both unhesitatingly opted for the " here and now," and pleaded guilty to both charges.

" There are two separate cars involved then? " said Mr. Sutterthwick. " They are not alternative charges? "

" No, sir," said the clerk. " The charge sheet shows that the index numbers are different and the offences were not committed in the same place." He turned back to the defendants and put the remaining charges to them. Both pleaded guilty to using a motor-vehicle without that user being covered by a third party insurance policy; and Ferme also admitted that he drove the vehicle without holding a driving licence.

" What are the facts? " inquired the magistrate of the detective in charge of the case. That officer had recovered his composure and breath and was able to give a commendably clear and succinct account of the previous night's happenings. The two men had, at 12.15 a.m., been seen in a parked car by two uniformed constables on patrol. The attention of the officers had been drawn by the ineffectual efforts being made to start the car. They found George Ferme in the driving seat, with Horace Old sitting beside him. The demeanour of the defendants immediately aroused suspicion, and a few pertinent questions soon made it obvious that they had no right to be in the car. The officers had already noticed, just past a road junction a short distance away, an abandoned car which as it turned the corner had apparently been damaged in a collision with a " Keep Left " sign. Two and two were put together in the traditional police manner and a few more questions to the defendants obtained their agreement with the answer arrived at by the constables. The second car had been taken from a street about a mile away; the damage to it had prevented it being driven any further and forced its wrongful occupants to try to find another conveyance.

The characters of the accused

" What's known about them? " said the magistrate.

" George Ferme, your worship, is aged twenty-three, and is a married man with one child," said the detective officer. " He has two previous convictions and two findings of guilt as a juvenile. . . ."

" Well, it's eight years since he was a juvenile. How long ago were his convictions as an adult? " interposed Mr. Sutterthwick.

" Five years ago he was fined £10 for larceny as a servant, your worship, and two years later he was sent to Borstal for shopbreaking. He joined the army when released on licence and has been serving in this country since then. At the time of these offences he had been given compassionate leave because his wife was ill, I understand."

" And yet he's found at midnight driving about in other people's cars," was the magistrate's comment.

" I was on my way home, sir. I'd missed the last train," put in the defendant.

" Where does his wife live? " asked Mr. Sutterthwick.

" In Birmingham, your worship," said the officer.

" But from where the first car was taken to where it was abandoned is going in the opposite direction, isn't it? "

" Yes, your worship."

" I lost my way, sir," said George Ferme, a shade too readily.

" And it was just a coincidence, I suppose, that you were on the main London road? "

"Yes, sir. I wouldn't want to go to London. I don't know anybody there."

"Where does the other man come from?" the magistrate inquired.

"He's a Londoner," replied the officer.

"I didn't want to go home," said Horace Old hurriedly.

"He's living apart from his wife," explained the officer.

"What else can you tell me about him?" said Mr. Sutterthwick.

"He's aged twenty-five, your worship; and was before the court eighteen months ago when he was conditionally discharged as a suspected person loitering with intent to steal from unattended cars. He has had a number of jobs since he left school, but for the last six months he has been acting as a bookmaker's clerk three nights a week at the dogs. He tells me he gets paid £6 for that, and does odd jobs as well. He doesn't make any payments to his wife."

"Are there any children?"

"No, your worship."

"Is what the officer has told me about you correct?" Mr. Sutterthwick asked the two men. They confirmed that it was.

"What have you to say to me?" was the next question. Horace Old was the first to think of something to say. "Very sorry it happened, sir," he said, "It won't happen again if you give me another chance. I'd been drinking all day and I didn't hardly know what I was doing."

"In a case like this when you're found in a car, I'm not sure that suggesting you were under the influence of drink helps you," remarked the magistrate.

"I wasn't driving, sir. I don't know how to."

"Nor does Ferme by the sound of it, but that didn't stop him trying, and smashing up somebody else's car in the process."

"George hadn't been drinking with me," said Old quickly.

"How long have these two men known one another?" asked Mr. Sutterthwick, turning to the witness box.

"They only met last night, as far as we know," the officer replied.

"And what was the object of all this? Where were they intending to go with these cars?"

"It's difficult to say for certain, your worship. It may have been merely a joy ride. On the other hand, they might have wanted the car to commit some felony. Or it may even be that Ferme intended to desert from the army, and they were on their way to London where he'd have a better chance of hiding. We just don't know. . . . An officer from Ferme's unit is present if you wish to hear him, your worship."

"Yes, let him come forward."

Witnesses for the defence

A tall, slim young gentleman who gave an air almost of elegance to his battledress rose from behind counsel's seat and marched across the court room with a thunderous tread. The army officer replaced the police officer in the witness box and in impeccably "U" accents gave his name and that of the regiment in which he was serving as a second lieutenant.

"What can you tell me about this man?" said Mr. Sutterthwick.

"He signed on for a three years' engagement, sir; and has been in my unit for the past eleven months. His military character is assessed as good. . . ."

"That's about the worst character you can have in the army, isn't it?" interposed the magistrate.

"Something like that," replied the young second lieutenant, startled for a moment out of his too recently acquired professional correctness. Recollecting his role quickly, he went on: "We do know that there have been domestic difficulties recently; and that was why he was given compassionate leave. We feel that worry over his wife may account for the position he finds himself in now, sir."

"How?" queried Mr. Sutterthwick.

Whoever had "briefed" the officer had evidently omitted to provide him with the answer to this question, for he pondered for some moments without producing any reply.

"I don't see how concern over his wife which justified his being given special leave to visit her accounts for his being found after midnight going in the opposite direction in someone else's car," said the magistrate; turning to the defendant Ferme he added: "What have you to say about it, yourself?"

"I know it was a silly thing to do, your worship. I intended to turn over a new leaf in the army. But all this worry over my wife seems to have got me down, sort of. I felt all funny in my head and I don't think I was really responsible for what I was doing, sir."

"Oh, what makes you think that?" said Mr. Sutterthwick in most unsympathetic tones.

"My mother's in court, sir. She can tell you all about it. She's got a letter from the doctor."

"If you really need your mother to speak for you, at your age, I'll certainly listen to her."

Sergeant Quing beckoned forward from the public at the back of the court an anxious looking, prematurely old woman in drab clothes.

" He's never been strong, sir," she burst out as soon as she was installed in the witness box. " I had a lot of trouble rearing him and he's always had bad turns with his head. I never had any trouble with any of my others. He's got three brothers and a sister all married and doing well. But I was for ever having to take Georgie to the doctor. He's not a bad boy really. In fact, he's always been a very good boy to me. But I don't think this wife of his is much good to him, if you don't mind me saying so, sir. I've got a letter from the doctor who knows him. I went and got it this morning as soon as I heard of this bother. I don't know what's in it, but the doctor said he'd do what he could to help Georgie."

The warrant officer took the envelope from her, opened it and handed the letter it contained to the magistrate. The court clock ticked quietly away as he read it.

" Well," said Mr. Sutterthwick at last, to Ferme, " What it all boils down to is that you suffer from migraine—like quite a number of perfectly respectable people—but the doctor seems to think that it may have some bearing on these offences you've committed, though I can't understand the connection, myself." He turned to Mrs. Ferme and said: " These attacks of migraine mean he has a very bad headache and is more or less incapacitated, don't they? "

" Yes, sir. He isn't himself at all then."

" You wouldn't expect him to be staying up till midnight and careering about in cars, in that state, would you? "

" He can't drive a car, sir. Unless he's learned in the army. But to tell you the truth, sir, I think it was more the trouble with his wife than anything that's put him where he is now."

" It couldn't have been that that put him where he was when he was sent to Borstal for shop-breaking."

" He was going out with another young lady, then, sir, and he'd had a bit of a tiff with her just before he did it."

" What about his appearances in court as a juvenile? Were they the result of unfortunate love affairs too? "

" Oh, I couldn't say about that, sir. He didn't always tell me his troubles when he should have done."

" I see," said Mr. Sutterthwick. " Well, thank you, Mrs. Ferme. You've done your best for your son. I'm sorry you've had to come here. I hope he is, too."

" Please give him another chance, sir," pleaded Mrs. Ferme.

" Stand down now, please, madam," said Sergeant Quing gently, assisting her down from the witness box.

Mr. Sutterthwick gives his verdict

Mr. Sutterthwick turned to the prisoner and said "I'm not at all favourably impressed by you, George Ferme. This is a bad case and my powers of punishment are limited. I think I shall send you to Sessions so that you can be sentenced there."

Frell jumped to his feet and whispered to the magistrate, "You can't use section 29 for the full offence, sir, because we started that summarily. And if you send him to Sessions for the attempt they can't give him any more on that than you can."

"But I heard you give him the usual warning about being sent there for sentence if I decided that my powers of punishment weren't sufficient," Mr. Sutterthwick whispered back.

"Yes, sir, he has to be told that as the attempt is an indictable offence only, and can't be dealt with here unless the prescribed formula is used to get his consent under section 19. But subsection (9) lays down that he can't, in fact, get any more than he can get on summary conviction for the completed offence."

"I don't doubt that you're right, Mr. Frell," said the magistrate. "But it all sounds a bit silly to me."

"I don't make the law, sir," said the clerk, a trifle stiffly, "I only look it up."

Frell sat down and Mr. Sutterthwick said to Ferme, "On second thoughts I shan't send you to Sessions. But I still think you richly deserve it. This type of offence may have the most serious consequences. Supposing you had killed or badly injured some breadwinner. There was no insurance policy covering the car while you were driving it. His dependants wouldn't have much hope of getting any compensation out of you personally, would they?"

"I believe there's a special fund they use for paying damages when there's no insurance," said the defendant brightly.

"Oh, so that's what is in your mind," exclaimed Mr. Sutterthwick, rather taken aback at this response to one of his favourite homilies. "I hope you don't think that excuses your conduct in any way? You haven't paid anything into any compensation fund, have you?"

"No sir," mumbled the defendant, rather taken aback himself at the way the tables were turned on him.

"Nothing you've said from the dock disposes me in your favour at all," resumed the magistrate. "But your doctor appears to think there may be some medical reason to account for your actions. I don't see any signs of it myself. You seem to me just a selfish, irresponsible young man who has been spoiled by his mother because he played on her sympathies. However, I'll see what the prison doctor has to say about you. You'll be remanded a week for a medical report, and I'll ask the probation officer to report on you too. I shall remand you, Old, for a week also. So far as I can judge, you played a secondary role in this escapade, and your record isn't so bad as Ferme's. But I don't like what I've heard about your way of life recently. I'll see what the probation officer has to report about you as well."

" Can I have bail, sir? " said the defendants, practically in chorus.

" No, you cannot," snapped Mr. Sutterthwick. " You ought to consider yourselves very lucky you're not going to prison today under a sentence and not just on remand. And it may still come to that. I haven't made up my mind yet. Much will depend on what the probation officer reports next week."

" This way please," said Mure.

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A. E. Jones
1958

Larceny and False Pretences

By Professor J. C. Smith, M.A., LL.B.

A recent case in the Court of Appeal reveals an interesting difference of opinion between the Lords Justices on the distinction between larceny by a trick and obtaining by false pretences. The distinction is commonly stated as follows:

"In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud."[1]

The problem raised in the case now in question is: Where the owner intends to part with his property in the money or chattel, but to give it, not to "*the person taking it*" (as in Archbold's rule), but to a third party, so that the property does not pass, is the crime larceny or obtaining? Does the distinction between the two crimes depend on the owner's intention to pass the property, or on whether the property actually passes?

Is the question worth answering?

This preliminary question should, perhaps, be disposed of first. In the case under consideration Denning L.J. (as he then was) said: "In the criminal law the distinction between false pretences and larceny has ceased to be of practical importance," and it is indeed now provided (in effect) by section 44 (3) and (4) of the Larceny Act, 1916, that an accused who is charged with larceny, and whose crime turns out to be false pretences, may be convicted of false pretences and one who is charged with false pretences and whose crime turns out to be larceny may, nevertheless, be convicted of false pretences. The maximum punishment for the two crimes is the same (five years' imprisonment). It cannot be said that the question is entirely devoid of practical importance, however: larceny is a felony and false pretences only a misdemeanour and a number of consequences, which may be important, flow from this distinction.[2] Moreover, the provisions of section 44 have no application where the charge is not for the complete crime but for an attempt to commit it: *R.* v. *Gallagher.*[3] But the most compelling reason of all is surely that a jury, before they may convict of any crime, must be satisfied that that crime has been committed and, therefore, it is vital that a judge should be able to direct them accurately and precisely as to the distinction between the two offences.[4] Finally (and this, of course, is what prompted this note), no law teacher can be satisfied while there are two crimes if he is unable to explain the distinction between them.

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[1] Archbold, 554.

[2] Harris's *Criminal Law* (19th ed.), 12; Cross and Jones, *Introduction to Criminal Law* (3rd ed.), 30; Kenny, *Outlines of Criminal Law* (16th ed.), 94.

In attempting to answer the question it will be convenient to consider separately (a) the cases where the goods or money were delivered to the rogue by the owner, and (b) the cases where the goods or money were delivered to the rogue by an agent of the owner.

Delivery by the owner

The case which raises the problem is *Central Newbury Car Auctions, Ltd.* v. *Unity Finance, Ltd.*,[5] and the facts were that a personable stranger, giving the name of Cullis, visited the plaintiffs, and by false pretences induced them to enter into a transaction with him concerning a secondhand motor-car. By this transaction it was agreed that the plaintiffs should sell the car to a finance company, who should let it to Cullis. The finance company never accepted the proposal so the property in the car never passed to them. A man, who was presumably Cullis, sold the car to Mercury Motors, who sold it to Unity Finance, Ltd., who let it on hire-purchase terms to one Powell.

Now Cullis never had title to the car for, even if the transaction were valid and had been completed, he would only have been a bailee. He was therefore unable to give title to Mercury Motors, who, in turn, were unable to give title to Powell. The plaintiffs, therefore, sued Unity Finance and Powell for damages for conversion, and those defendants brought in Mercury Motors as third parties. The defence was that the plaintiffs, having entrusted Cullis with the possession of the car and the registration book, were estopped from denying that he had authority to sell the car. The Court of Appeal (Hodson and Morris L.JJ., Denning L.J. dissenting) held that there was no such estoppel; the plaintiffs, by entrusting Cullis with the registration book, had not held him out to be the owner of the car. "The book itself is not a document of title; its terms negative ownership and it contains no representation by the plaintiffs or anyone else that the thief was entitled to deal with the car as his own.' Denning L.J., however, thought that the plaintiffs were estopped.

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[3] (1929) 21 Cr.App.R. 172.

[4] *Cf.* Kenny, *op. cit.*, 288.

[5] [1956] 3 W.L.R. 1068.

The difference in judicial opinion extended to the criminal aspects of the case. Hodson L.J. took the view that "There was no contractual relationship between the plaintiffs and Cullis and they were the victims of larceny by a trick." Morris L.J. expressed no view on Cullis's crime. Denning L.J., on the other hand, thought that he was guilty of obtaining by false pretences. He said:

> " . . . the distinction between the two is that in obtaining by false pretences the owner intends to part with the property in the goods, whereas in larceny by a trick he only intends to part with custody or possession. The cases show that if a person, through the fraudulent representation of another, delivers to him a chattel, intending to pass the property in it to him *or to someone else*[6] (*R.* v. *Atkinson*[7]), or to give him power to pass the property in it at the present or some future time, conditionally or unconditionally . . . the fraudulent person cannot be indicted for larceny but only for obtaining the chattel by false pretences."

The case of *Atkinson* certainly supports Denning L.J.'s proposition. The prisoner in that case sent one Dale with a letter directed to Dunn, and told Dale to say to Dunn that he came from a Mr. Broad. The letter was written in the name of Broad, a friend of Dunn's, soliciting a loan of £3 and requesting that the money might be sent back immediately. Dunn put banknotes in a letter directed to Broad and gave it to Dale, who delivered it to the prisoner as he had been instructed. The letter was a forgery. The judges held that this was no felony on the ground that the property was intended to pass by the delivery of the owner. It is clear that Dunn did not intend to make either Dale or Atkinson the owner of the £3, and that he could have taken it back if he had been able to identify it in the possession of either of them. It is equally clear that Broad never became the owner of the money for the money was never delivered to him or his agent. It remained, then, the property of the prosecutor. In just the same way the car remained the property of the Central Newbury Car Auctions, though they, when handing it over, intended to transfer their property in it to the finance company.

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[6] My italics.
[7] (1799) 2 East P.C. 673.

Nor does *Atkinson* stand alone. *R.* v. *Coleman*[8] is to the same effect. The prisoner falsely pretended to the prosecutor that she had been sent by a neighbour for change for half a guinea, and that the neighbour would send the half-guinea presently. She obtained the money (*i.e.*, possession but not ownership, which remained in the prosecutor) and never returned, but it was held that this was no felony.

In *R.* v. *Phineas Adams*[9] the prisoner sent a boy to a hat-maker, Beer, to say that he was sent by one Paul to collect a hat which Beer had made for the latter. Beer delivered the hat to the boy who took it to the prisoner. Brett J. said of this case in *Middleton* (considered below): "No property passed to Paul, because there was no delivery to him or to an agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat." Now it might be argued, contrary to the view of Brett J., that property did in fact pass to Paul, because delivery of the hat was an unconditional appropriation of goods to the contract within section 18, rule 1, of the Sale of Goods Act, 1893 (codifying the common law), in which case the property would pass to Paul on delivery.[10] But, by no stretch of imagination can it be supposed that the property passed to the *prisoner*. Yet the judges held that *Adams's* conviction for larceny was wrong, and that it was a case of obtaining by false pretences.

In *R.* v. *George Adams*[11] the prisoner went to B's shop and said he had come from C (who occasionally dealt with B) for some hams, etc., and produced a forged note, purporting to be written by C, and requesting B to deliver the goods in question to the bearer. The goods were delivered to Adams. Once again the owner intended to part with his ownership in the goods, but to a third party and not to the thief; once again the property did not in fact pass to anyone but remained in the original owner; and once again it was held to be no larceny.

Delivery by the owner's agent

The view of the common law seems to have been different where the person delivering the goods to the rogue was not the owner himself, but a servant or agent with limited authority. The position here apparently was that if the agent's authority was so limited that he could not transfer the property in the goods, then the crime was larceny, whatever the agent's intention.

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[8] (1785) 2 East P.C. 672.

[9] (1812) Russ. & Ry. 225.

[10] See Roscoe, *Criminal Evidence*, 669; and Pollock and Wright on *Possession in the Common Law*, 188n.

[11] (1844) 1 Den. 38.

R. v. *Jackson*[12] was a case of a servant with a general authority to manage the prosecutor's pawnbroking business, who was induced by the prisoner's misrepresentations to deliver up property which the prisoner had previously pledged. The judges were unanimous that the case was not larceny, " because the servant, who had a general authority from the master, parted with the property and ownership, not merely with the possession." But in *R.* v. *Longstreeth*[13] the prisoner persuaded the servant of the prosecutor, a carrier, that a certain parcel of tea which had arrived at the prosecutor's warehouse, directed to " J. Creighton, Tewkesbury," was intended for him and obtained possession of it. On the facts there can be little doubt that the servant intended to pass the property to the p~~rosecu~~tor [illegible], but the judges held " that the ownership of the goods was not parted with, the carrier's servant having no authority to part with ownership to the prisoner, and the taking was therefore larceny."

✳ The clearest statement of the principle is to be found in *R.* v. *Stewart*,[14] where the prosecutor sent one Davies with goods previously ordered by Mrs. Stewart to the Stewarts' home, and gave Davies strict instructions not to leave the goods without receiving the price. Stewart persuaded Davies to leave the goods in return for a cheque which was later dishonoured. Alderson B. held that, if the prisoner knew that the cheque was worthless, this was a case of larceny. He said:

> ✳ " Here, if the owner himself had carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretences; or if the servant had had a general authority to act, it would have been the same as though the master acted. But in this instance he had but a limited authority which he chose to exceed."

If the master himself had parted with the goods no doubt property would have been transferred; as the servant was exceeding his authority, it was not; yet there can be little doubt that the servant *intended* to transfer property. ✳ These cases were not, apparently, regarded as inconsistent with those where the owner himself dealt with the property; and the principle to be derived from the cases so far considered therefore seems to be: where the owner, or his agent with general authority to act, delivered goods, intending the property to pass to the prisoner or a third party, the crime was not larceny but false pretences, even though the property

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[12] (1826) 1 Mood. 119.
[13] (1826) 1 Mood. 137.
[14] (1845) 1 Cox 174.

did not in fact pass but where the goods were delivered by an agent with limited authority the crime was larceny unless the property in fact passed.[15]

The effect of R. v. Middleton

All these cases were, however, before the Court for Crown Cases Reserved in the well-known case of *Middleton*,[16] where the point now under consideration was expressly discussed. There, it will be remembered, it was held by a majority of eleven judges to four that, where a post office clerk refers to a wrong letter of advice and hands to a depositor a sum greater than that to which he is entitled, the depositor is guilty of larceny if, knowing of the clerk's mistake, he takes the money. The case falls into the first group as it was decided by the majority on the assumption that the clerk "had such authority from the Postmaster-General that all he did is to be taken as done by the Postmaster-General." The view of the majority was that the clerk intended to part with the property in the money (and this could hardly be denied on the facts) but that his mistake in some way prevented the property from passing so that it still remained in the Postmaster-General and never vested in the prisoner at all.

The majority acknowledged that the cases of *Phineas Adams* and *Atkinson* "appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny." "But," they added, "we are unable to perceive or understand on what principles the cases can be supported if *R.* v. *Davenport*[17] and others[18] involving the same principle are law."

Now it is not at all clear that *Davenport* is inconsistent with *Adams* and *Atkinson*. In *Davenport* the prisoner who had recently left the service of a gentleman called at the prosecutor's shop and falsely represented that his former master had sent him for a silver cream ewer, which was to be put down to the master's account. The prosecutor gave him two ewers in order that his master might select that which he liked best, and the prisoner took both and sold them. It was held that Davenport was guilty of larceny. Now it is clear that the prosecutor, when delivering the ewers, did *not* then intend to part with his property in either of them. But Bayley J. said that if the prosecutor had sent one ewer only (in which case it is clear that the prosecutor would have *intended* to part with his property but it would not in fact have passed) and charged the customer with that, the result would have been otherwise. The position would then have been the same as in *Adams* and *Atkinson*. It therefore appears that in *Davenport*, too, the question was not "Did the property actually pass?" but "Did the prosecutor intend to part with his property?" and that this case also supports Denning L.J.'s view of the law.

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[15] Mr. Turner has argued that, even in cases involving the owner's agent, the real question is whether there was an intention to pass the property, and not whether the property actually passed. The absence of authority to pass ownership, in his view, was relevant only as "conclusive evidence of no intent to do so": *The Modern Approach to Criminal Law*, 364. It is not, however, easy to reconcile this view with the facts of *Longstreeth* or *Stewart*. In both cases the servant was clearly persuaded that he was dealing with the person entitled to the ownership of the goods in question.

[16] (1873) 2 C.C.R. 38.

[17] (1826) Russell on *Crime* (4th ed., 200; 10th ed., 1092).

[18] The only other case referred to in the report as coming within the same category as *Davenport* is *Savage* (1831) 5 C. & P. 143, where the facts were similar, with the important difference that Patteson J. assumed that the prisoner had in fact been sent for the goods alleged to have been stolen and received them properly.

The cases before *Middleton* support Denning L.J. What is the effect of *Middleton*? Beale thought that it was to overrule cases such as *Coleman* and *Atkinson* in so far as they decided that the crime of larceny was not committed: *i.e.*, that *Middleton* settled that it is larceny where the property does not actually pass, though it is intended to do so; but he thought they remained good law in so far as they decided that false pretences was committed—the accused in these cases were guilty of both crimes! ("The Borderland of Larceny." [19]) The tendency in England, however, has been to regard larceny and false pretences as mutually exclusive and to assume, in effect, that *Coleman*, *Atkinson*, etc., are no longer good law. Thus the well-known civil case of *Cundy* v. *Lindsay*,[20] which is frequently cited in discussions of the criminal law, and where the situation was similar to that in *Coleman* and *Atkinson* (Lindsay delivered goods to Blenkarn, thinking that he was dealing with, and intending to transfer property to, Blenkiron & Co.) is commonly regarded as a case of larceny and not of false pretences.[21]

The position at the present day is, therefore, not entirely clear. Is *Middleton* to be taken to have overruled the whole of the previous authority on the point under consideration? The general assumption seems to be that it is, and, indeed, unless *Middleton* itself is to be considered wrong, this seems to be the only possible conclusion.[22] Mr. Turner has argued convincingly [23] that *Middleton* was wrongly decided, but the likelihood of its being overruled is now so slight that, as Mr. Turner says elsewhere,[24] for practical purposes the matter must probably be regarded as settled. It seems, then, that the likelihood is that the dictum of Hodson L.J. in the *Central Newbury Car Auctions* case was (with respect) right, and that of Denning L.J. wrong.[25] If the distinction depends, as it seems to, on the question whether the property passes, anomalous results follow. Suppose A admires B's gold pencil and offers him £5 for it. He tenders a cheque drawn on the C Bank.* B accepts the cheque and hands over the pencil. This looks like obtaining by false pretences.[26] But in fact B had found the pencil in the highway a year ago and, believing "findings are keepings," supposed he had a right to sell it. The pencil belongs to D and of course no property passed from B to A. Does this make A's crime larceny? According to *Middleton*, yes. Thus whether the crime is a felony or a misdemeanour depends on the accident of whether the victim happens to be the true owner, a matter which has no bearing whatever on the heinousness of the accused's conduct. This is but one anomaly among many, and it is submitted in conclusion that the distinction between the two crimes no longer serves any useful purpose; and that when the long awaited reform of the law of larceny takes place it might well be abolished.

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[19] (1893) 6 *Harvard Law Review* 244, 254.

[20] (1878) 3 App.Cas. 459.

[21] *Whitehorn Bros.* v. *Davison* [1911] 1 K.B. 463, *per* Buckley L.J. at 479; *per* Kennedy L.J. at 486; *Folkes* v. *King* [1923] 1 K.B. 282, 296, *per* Bankes L.J.; Kenny, *Outlines of Criminal Law* (16th ed.), 279; Russell on *Crime* (10th ed.), 1112; Cross and Jones, *Introduction to Criminal Law* (3rd ed.), 192.

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[22] *Cf.* Cleasby B. in *Middleton* (1873) 2 C.C.R. 38, 70–71.

[23] *Modern Approach to Criminal Law*, 356.

[24] Russell on *Crime*, 1152.

[25] It is not thought that the position in the criminal law had any bearing on the result of the civil proceeding.

[26] *Cf. R.* v. *Hazelton* (1874) 2 C.C.R. 134.

* see CORRIGENDUM p.142 "A has no account with C Bank".

A New Zealand Letter *

By Professor I. D. CAMPBELL,
Victoria University of Wellington

Obstructing the police

In *Steele* v. *Kingsbeer*,[1] McGregor J. dismissed an appeal from a conviction for obstructing an inspector of licensed premises in the discharge of his duty. A police sergeant, who was an inspector of licensed premises, had questioned a youth who was consuming liquor in the bar, and had ascertained that he was under twenty-one. The sergeant then questioned one of his companions in order to discover who had supplied liquor to the youth and who had purchased it. The appellant then approached and said: " Just give him your name and address. Don't give him anything else. All you have to give him is your name and address." It was held that the sergeant was under a duty to endeavour to elicit the information when he suspected that an offence had been committed; that the person interrogated was entirely within his rights in refusing to give any further information; but that the appellant by his conduct had committed the offence of obstructing the inspector in the discharge of his duty. In reaching this conclusion the court followed *Hinchcliffe* v. *Sheldon*,[2] in which Lord Goddard C.J. defined obstruction as " making it more difficult for the police to carry out their duties."

This case may be compared with *Hogben* v. *Chandler*.[3] Two detectives investigating a gold robbery wished to interview the Carlson brothers. Chandler said to the Carlsons: " Don't answer any questions. Don't get out of the car and don't tell these men anything." Chandler was convicted of hindering a member of the police force in the execution of his duty, but the Supreme Court of Victoria set aside the conviction. Martin J. held that it was not an offence to advise a person not to answer police interrogation unless the person interrogated was under a legal duty to answer. It was conceded, he said, that a solicitor could always advise a client to refuse to answer questions put to him by the police. A parent or friend might give advice of the same nature, and it would be hard and illogical, he said, if he thereby committed an offence whilst a solicitor did not. " It seems to me that a person who, hearing a police constable questioning someone, says ' Don't answer, he has no right to question you,' or words to that effect, is not necessarily hindering the police constable in the execution of his duty, though it may be there are cases and circumstances in which such advice may amount to ' hindering.' If there are such cases this is not one of them."

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* This letter was written before the recent change of government in New Zealand. The policy of the new Government on some of the matters treated here is expected to be made known shortly.

[1] [1957] N.Z.L.R. 552.

[2] [1955] 1 W.L.R. 1207; [1955] 3 All E.R. 406.

[3] [1940] A.L.R. 181.

Presumably this case was not cited in *Steele* v. *Kingsbeer*, and the decisions appear to be irreconcilable. Once it is conceded that the police have the right and the duty to ask questions, even though the person being questioned is under no compulsion to answer, the conclusion seems inescapable that a person who advises him to exercise his privilege is guilty of obstruction if the result is a refusal to give information. If this is an offence, the fact that the defendant was a close friend or relative is only a matter of mitigation; and the solicitor has no special privilege to entitle him to break the law.

In neither case did the appellant merely inform the other person of his legal rights. In both cases he expressly advised him to withhold information. The court did not have to consider whether merely telling a person that he was not bound to answer questions would be an offence. No doubt such a statement would usually be made in such a way as to imply that no information should be given, and it must be immaterial whether that advice is express or implied. But if no suggestion is made that the person concerned should refuse to co-operate, would an offence be committed? It is submitted that there would be no offence in this case. The defendant must do something to induce the other person to remain silent. It is true that a causal connection could still be traced in these circumstances between the making of the statement about a person's legal rights and a subsequent refusal to give information to the police; but unless a line is drawn at this point the offence of " obstruction " will be carried to unbearable limits.

Entering by a casement window

In *R.* v. *Parry*,[4] the appellant had gained entry to a shop by way of a window. The window had been fastened in a partly open position by a casement stay. The evidence was that the appellant had inserted his hand through the opening, lifted the stay, and opened the window wide enough to gain entry to the building. The Court of Appeal held that this constituted a "breaking" within the first part of the statutory definition in the Crimes Act, 1908, s. 271, which reads:

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[4] [1957] N.Z.L.R. 846.

> "To break" means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight) any door, window, shutter, cellar-flap, or other thing intended to cover openings to the building, or to give passage from one part of it to another.

In the opinion of the Court of Appeal the first portion of the definition adopts the common law concept of breaking, and the second portion of the definition widens the concept by adding to it specified types of opening. It was held that the first part of the definition was to be construed as including any act which would have constituted an actual breaking at common law. For the meaning of "actual breaking" at common law the court accepted the statement in Archbold, 33rd ed., 686, which includes unloosening a window fastening.

In *Halley* v. *The Crown,*[5] the Full Court of Western Australia had held, on a similar definition, that opening a partly open casement window after unlatching a stay did not constitute a breaking. The Court of Appeal distinguished that case on the ground that the Full Court had not considered whether the act of the accused might constitute an actual breaking within the first part of the definition. In Western Australia the Full Court had regarded the case as one of constructive breaking or no breaking at all. In New Zealand, however, the Court of Appeal held that there was an actual breaking.

In reaching this conclusion the court had considerable support in decisions at common law (though *R.* v. *Lackey*,[6] which is directly in point, was overlooked), but appears to have entirely ignored the principles applicable in the interpretation of a code. "To break," in the ordinary meaning of those words, cannot include the lifting of a latch; and it is difficult to see any ground on which the court could disregard the rule constantly laid down by the highest tribunals that in construing a code reference may not be made to the previous state of the common law if the words used are, in their ordinary acceptation, unambiguous. See, for example, *Wallace-Johnson* v. *R.*[7]

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[5] (1938) 40 W.A.L.R. 105.

[6] [1954] Crim.L.R. 57.

[7] [1940] A.C. 231.

Effect of suicide on a civil claim

In *Pigney* v. *Pointers Transport Services, Ltd.*,[8] the defendants were responsible for a negligent act which caused injury to one of their employees. As a result of the injury he suffered from acute neurotic depression but was not insane. Eventually he took his own life. Pilcher J. held that his widow could recover damages from the defendants in respect of her husband's death, although the direct cause of death was his felonious act in committing suicide. The rule of public policy, that a criminal (and his estate) cannot by legal action obtain a benefit from his crime, was held to be inapplicable.

In *McFarland* v. *Stewart*,[9] the Court of Appeal in New Zealand appears at first sight to have considered the same question and to have reached the oposite conclusion, but the cases are materially different. The widow of the deceased, who had killed himself by shooting, brought a claim under the Deaths by Accidents Compensation Act, 1880 (which was based on the Fatal Accidents Act of 1846), but failed on the ground that the claim was based on a death caused by suicide while sane. It was held by the majority of the Court of Appeal that the plaintiff could not recover damages unless the deceased, if he had not died, could have maintained an action for the injury he sustained by his act of shooting himself. But in this case the only act of negligence on the part of the defendant had been leaving a weapon where it was accessible to the inmates of the inebriates' home to which the deceased had been admitted. This negligence alone would have given him no claim to damages. In the *Pigney* case, on the other hand, the act of negligence had already caused injury and would have entitled the injured man to damages had he lived.

Pilcher J. in *Pigney's* case said that if the deceased had been rendered insane as a result of the accident and had then committed suicide no difficulty would arise. The chain of causation would be complete, and there being no criminal act, no defence would be available on the ground of public policy. In *Murdoch* v. *British Israel Federation*,[10] the Court of Appeal dealt with precisely this situation. Damages were awarded under the Deaths by Accidents Compensation Act, 1908, to the widow of a man who had been seriously injured and had committed suicide while insane.

Simultaneous translation of evidence

The simultaneous translation of evidence which was a feature of the Nuremberg trials and is used in the Assembly of the United

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[8] [1957] 2 All E.R. 807.

[9] (1900) 19 N.Z.L.R. 22.

[10] [1942] N.Z.L.R. 600.

Nations has been adopted for use in the preliminary hearing of a murder case in Wellington in which the defendant is an Italian whose knowledge of English is limited. Everything said in the course of the proceedings is transmitted to the defendant through headphones by an interpreter seated a few feet from the dock. This is the first time that this method has been used in the Magistrates' Courts in New Zealand.

In the same case another innovation has been the method of adducing fingerprint evidence. The court is darkened and coloured slides are projected, showing fingerprints and palmprints as photographed by the police. These photographs are explained by the fingerprint expert in the witness-box. The defendant is handcuffed to a constable while the courtroom is in darkness.

Referendum on capital punishment abandoned

In 1956 the Government decided to hold a referendum on capital punishment at the time of the General Election in November 1957. Some of the objections to this proposal were mentioned in the New Zealand letter in this *Review* last year. After further consideration of the representations made by many interested organisations, especially the Churches, the Government has reversed its decision. The Prime Minister has now announced that instead of holding a referendum the Government, if re-elected, will introduce next year " a Bill which will embody the results of further investigations which we propose to make into the question of capital punishment."

The Government, he said, had been studying the recent United Kingdom legislation (the Homicide Act, 1957). " While we do not feel that this legislation can be adopted in New Zealand in the form in which it was passed in the United Kingdom, we do believe that the law in New Zealand can be altered to provide for the death penalty in the worst cases of murder only. We propose to investigate a proposition to this effect and to seek the opinion of those in a position to advise the Government with a view to introducing a Bill next session to provide for the death penalty in the worst types of murder and for indeterminate detention for other cases of murder." He added that as regards the Government members of the House the legislation would be the subject of a free vote.

New Court of Appeal

The Judicature Amendment Act, 1957, establishes a separate Court of Appeal in New Zealand, replacing the existing Court of Appeal. At present the judges of the Supreme Court are also judges of the Court of Appeal. Under the new system, which comes into operation at the beginning of 1958, the Court of Appeal will consist of the Chief Justice of New Zealand (who will continue to be a Supreme Court judge) and three other judges specially appointed to the Court of Appeal as permanent members. The new tribunal will have jurisdiction in both civil and criminal matters, as is the case with the existing Court of Appeal.

The opinion has been expressed that in criminal matters the constitution of the new court is less satisfactory than the present Court of Appeal, in that the permanent members will not be kept continually in touch with the exigencies of actual criminal trials. They will no longer be presiding in criminal cases with a jury. It remains to be seen whether this lack of direct contact with criminal trials has any adverse effect on the decisions of the court.

Trial by one's peers

It may have been the recollection of the famous clause in Magna Carta that led the New Zealand legislature, last century, to enact that Maoris should have the right to trial by Maoris. The present provision is contained in the Juries Act, 1908, s. 144, and gives a Maori who is charged with an offence against a Maori the right to claim to be tried by a Maori jury. At Auckland recently a Maori who had shot and injured his wife exercised his statutory right to claim trial by a Maori jury. The Maori jury acquitted him of attempting to murder his wife, but found him guilty of wounding her with intent to cause grievous bodily harm. In another recent case a Maori jury acquitted a Maori woman charged with bigamy.

Misguided juror

A juryman had the misfortune to find himself empanelled on a jury which was to try one of his old friends. It became apparent during the progress of the trial that a verdict of guilty was likely to be returned. The juror thereupon called at the home of the accused with the intention of saying that he did not want the accused to have any hard feelings because of what might happen at the trial. The accused was still in custody and the juror did not see him, but when the judge heard what had occurred the juror was admonished. As the jury had brought in a verdict of guilty it was obvious that the juror had not failed to do his duty, but His Honour said that if the juror had seen the accused some disciplinary action would have been considered. "It is a fundamental requirement that no juror shall have any contact with an accused person during a trial."

The scope of police discretion

Dissatisfaction with the liquor licensing laws of New Zealand has been freely expressed for a long time. The police are frequently criticised when enforcing unpopular restrictions, and at other times are charged with failing to do their duty adequately. The Controller-General of Police made some pointed remarks on this question in his annual report to Parliament. He said it was unfair to the individual policeman, as it was improper and wholly undesirable, that he should be expected to exercise a wide discretion about the application of the licensing laws. " I believe in the exercise of reasonable police discretion, particularly among juveniles, in the field of crime prevention," he said. " It is, however, quite unacceptable that a policeman should make his own licensing laws because it is the wish of a substantial number of people on his beat."

The policeman had his oath of office to observe, and the whole community expected him to do so, except when it came to the licensing laws, which some wanted observed and others did not.

" Here the policeman is expected to please everyone," he said. " That is impossible. The only way in which a policeman can commend himself to the community and retain his own self-respect is to see that the licensing laws, however unpopular they may be with some, are observed."

Impartiality of jurors

A fourteen-year-old girl climbed out of a bedroom window one Saturday evening and went to a nearby city. There she met four young men who took her to a " party " in a sports pavilion. They were subsequently charged with unlawful carnal knowledge and tried separately. Four persons who had been members of the jury which tried one of the offenders were again empanelled in the jury to try one of the others. The conviction so obtained was set aside by the Court of Appeal. By reason of their acquaintance with the evidence in the former case they could not approach the evidence in the later case with open and impartial minds. The Court of Appeal, in quashing the conviction, again emphasised that to secure a fair and impartial trial must always be a paramount consideration. The judge, it was held, has an inherent jurisdiction to exclude a juror from taking his place in the jury box if satisfied that justice so requires.

Telephone tapping

In June last the Postmaster-General made a statement in the House of Representatives regarding telephone tapping, which was then much in the news on account of certain events reported from England. He said: " I should like to assure members that there is no telephone tapping in this country with one exception, and that is on the authority of the Prime Minister where the national security may be involved. In those circumstances and those circumstances only will telephone tapping be tolerated. For the purpose of ordinary criminal administration there will be no telephone tapping." The Government, he said, had not found the occasion for allowing telephone tapping during its eight years of office.

Publication of names of persons convicted

The publication of the names of persons convicted of offences is usually regarded as one of the disagreeable consequences of a conviction even though it does not form part of the sentence of the court. There is a discretionary power to order that the name of the accused be not published except where he has previously been convicted of an offence punishable by imprisonment: Criminal Justice Act, 1954, s. 46. An unusual course was taken by a magistrate in a recent case in which an order was made prohibiting publication of the name of a man who had pleaded guilty to importing indecent documents. The magistrate, in imposing a fine of £35, said that he had considered imposing the minimum fine, but the accused would have to pay for the privilege of having his name suppressed. It is respectfully submitted that this is a principle which should on no account be accepted as a precedent.

The function of coroners

The historic functions of a coroner's inquest have passed through several transformations. In New Zealand a coroner's inquest is not a civil or criminal trial, nor in any way concerned with civil or criminal liability, although counsel often seek to obtain admissions from witnesses or findings by the coroner which will help in other proceedings that are contemplated. The coroner at Auckland has had occasion to stress this when counsel invited him to include in his verdict a finding as to which of two persons had been the driver of a motor-cycle at the time of a collision. The motor-cycle carried two persons, one of whom was killed. The coroner said: " An inquest is not a civil or criminal trial. It is not the proper occasion to consider questions of negligence or criminal liability—there are no parties to an inquest, the rules of evidence are relaxed, and the jurisdiction of the coroner is limited to an investigation of the facts when, where and how the death occurred. In view of the fact that liability, whether civil or criminal, may well depend on a decision on the point as to who was the actual driver, I deem it proper in this particular case to leave that point unanswered, it being unnecessary for the purposes of my finding."

The black sheep of the police force

In March, 1957, a detective-sergeant and a detective were each sentenced to two years' gaol on charges of demanding money with menaces with intent to steal it. The Controller-General of Police had some very apt comments on the tendency of some critics to make this a ground for attacking the integrity of the force. "It should always be remembered," he said, "that when a policeman is placed in the dock he is put there by his colleagues. Curiously there are some who find the occasion for criticism of the police as a whole when these episodes occur. I hope that right-thinking people find it not so much a matter for concern but rather a matter that should heighten their confidence in the force as a whole. The force has its influence on the national character, hence its responsibility is very much greater and more far-reaching than the mere preservation of peace and good order and the apprehension of offenders."

Revision of the criminal code

On October 24, 1957, the Attorney-General introduced the Crimes Bill in the House of Representatives. This is a comprehensive revision of the Crimes Act, 1908, which was itself a re-enactment of the criminal code which came into force in New Zealand in 1893. This is the first major revision of the legislation since that time. The Bill is not being passed this year, but has been introduced to enable it to be widely circulated and examined. After comments and criticisms have been considered a similar measure will be introduced in 1958 and is expected to be brought into force at the beginning of 1959.

The Bill owes something to the Canadian reforms of 1955, to which your Canadian contributors referred in [1956] Crim.L.R. 687, but in the main it expresses an independent and original, though not revolutionary, approach to the problems of criminal law and procedure. Several new offences are created, some new defences are introduced (including some provisions adapted from the Homicide Act, 1957), maximum penalties are drastically revised and a host of amendments are proposed in almost every aspect of the criminal code. The most interesting of these proposals will be discussed in my next letter.

So that's what they're like in Yorkshire

It is reported that in a case at Leeds the judge described one of the parties as "an ordinary young Yorkshireman, greatly interested in sexual matters."

Appeals to and from Quarter Sessions

By C. E. S. HORSFORD, *Barrister-at-Law*

Appellate Jurisdiction

The right of appeal

A person convicted by a magistrates' court may appeal within fourteen days of the decision of the court to quarter sessions against his sentence if he pleaded guilty or against his conviction or sentence if he pleaded not guilty, and for this purpose " sentence " does not include a probation order or order for conditional discharge (Magistrates' Courts Act, 1952, ss. 83, 84).

Quarter sessions derives these appellate powers from section 31 of the Summary Jurisdiction Act, 1879, as amended by the Summary Jurisdiction (Appeals) Act, 1933, s. 1, the relevant subsection of which is as follows:—

> " (vii) Quarter sessions may by their order confirm, reverse or vary the decision of the court of summary jurisdiction, or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division or place as the court by whom the decision appealed against was given, or may make out such other order in the matter as they think just, and by such order exercise any power which the court of summary jurisdiction might have exercised; . . ."

Notice of appeal

Where a notice of appeal is expressed to be against conviction only the court has power to award any punishment, whether more or less severe than that awarded by the court of summary jurisdiction which that court might have awarded (Summary Jurisdiction Act, 1879, s. 31 (1) (viii), as amended by Summary Jurisdiction (Appeals) Act, 1933, s. 1).

Grounds of appeal must be stated in the Notice of Appeal. Wide powers of amendment are conferred on the court by the Quarter Sessions Act, 1849, but they do not include a power to allow the stating of a ground of appeal in a notice in which no ground of appeal was given (108 J.P. 507 and cases there cited).

Procedure

The powers and duties of quarter sessions as regards appeals from courts of summary jurisdiction are exercised by courts consisting of not less than three nor more than twelve members of the Appeal Committee, which is appointed annually, and hence it has no jurisdiction to make an order in an appeal determined before its appointment (*Lincoln JJ.* [1944] 1 All E.R. 286).

At the County of London Quarter Sessions, the appellate jurisdiction of the court may be exercised by the chairman or a deputy chairman sitting alone, if none of the justices on the panel are present (Summary Jurisdiction (Appeals) Act, 1933, s. 8 ; and see s. 7).

The proceedings shall be commenced by the giving of notice to the clerk of the magistrates' court and to the other party (Magistrates' Courts Act, 1952, s. 84 (1)).

The appellate court rehears the case against the appellant with a view to determining whether the court below was right as to (a) conviction, (b) sentence, (c) any other order, *e.g.*, endorsement of licence, disqualification, etc.

As the appeal is a rehearing, evidence is not limited to that which was given in the court of summary jurisdiction and no notice of additional evidence is necessary.

The words " make such other order " mean " order relevant to the matter in issue." They cannot be construed so as to give power to find an appellant guilty of an offence other than that in respect of which he is appealing.

The words " and by such order exercise any power which the court of summary jurisdiction might have exercised," do not confer upon the committee any original jurisdiction. The power referred to in the passage just cited is limited to matters ancillary to the appeal. The jurisdiction of the committee is purely an appellate jurisdiction.

The statement, frequently made, that the committee has all the powers of a court of summary jurisdiction is inaccurate.

It is equally inaccurate to state, as is often done, that in appeals against convictions of indictable offences tried summarily the court takes the place of the jury which would have tried the case in a trial upon indictment. The verdict of a jury must be unanimous. The Appeal Committee decides issues of fact by a majority of the members constituting the court, the chairman having a casting vote.

The power of a court of summary jurisdiction to prefer a fresh charge against an accused person does not extend to the Appeal Committee ; if it did, that committee would be exercising an original and not an appellate jurisdiction and the accused person would be deprived of his right of appeal.

The power conferred on a jury in a trial upon indictment to find an accused person guilty of an offence different from the offence charged in an indictment, *e.g.*, embezzlement instead of larceny, and conversely, or of an attempt to commit an offence, is a power which is limited to trials upon indictment and cannot be exercised by the Appeal Committee.

The committee has power under section 35 of the Road Traffic Act, 1934, upon the hearing of an appeal against a conviction of reckless or dangerous driving under section 11 of the Road Traffic Act, 1930, if it decides that the charge is not substantiated by the evidence, but thinks that there is a prima facie case of careless driving under section 12 of that Act, to allow the appeal and quash the conviction under section 11, and by its order direct that a charge of careless driving under section 12 shall be preferred against the appellant. It is then for the prosecution to decide whether it will proceed with the fresh charge or not. The committee cannot try the appellant on this charge for the reasons already stated.

Sentence

In appeals against sentence only the prosecution, whilst under an obligation to place all available relevant information before the court, is not under an obligation to prove that the sentence appealed against was right (*Paprika* v. *B. O. T.* [1944] K.B. 327).

The limitations of punishments which may be ordered by the Appeal Committee are the same as for a court of summary jurisdiction. By section 108 of the Magistrates' Courts Act, 1952, where two or more sentences passed by a court of summary jurisdiction are ordered to run consecutively the aggregate term of imprisonment shall not exceed six months, unless such sentences included at least two sentences for indictable offences dealt with summarily by consent under section 19 of the Magistrates' Courts Act, 1952, in which case the aggregate term of imprisonment shall not exceed twelve months.

Notwithstanding the limitation imposed by section 108 of the Magistrates' Courts Act, 1952, a sentence of imprisonment, which must not exceed three months (*ibid.*, s. 64 (iv)), imposed in default of payment of a fine may be ordered to be consecutive to an aggregate term of imprisonment of twelve months.

Committals to quarter sessions. An Appeal Committee may commit a person to quarter sessions for sentence under section 28 of the Magistrates' Courts Act, 1952, but where this is done with a view to a sentence of Borstal detention being imposed, the requisite report as to suitability must first be obtained.

All questions of law and of fact are decided by a majority of the members of the court, the chairman having a second or casting vote where there is an even division of votes (Summary Jurisdiction Appeals Act, 1933, s. 7 (3) (*e*)).

Probation. Where in an appeal against sentence only the court considers that the appellant should have been placed on probation it should proceed to make a probation order.

Recognisances. In the case of a recognisance imposed by a magistrates' court under the Justices of the Peace Act, 1361, there is now a right of appeal to quarter sessions, conferred by section 1 of the Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956.

Appeals from Quarter Sessions

Appeal by way of case stated

At Common Law. Quarter sessions has the right to state a case for the opinion of the High Court on any question of law arising in an appeal. This right may be destroyed by the wording of a statute so framed as to make the decision of quarter sessions final and conclusive. The application for a case to be stated should be made when judgment is given.

By Statute. The Quarter Sessions Act, 1849, s. 11, gives power to the parties by consent and by order of a judge of the High Court to state a case. The practice is to give notice of appeal and then to take no further step at quarter sessions until motion for entry of the judgment of the High Court in the quarter sessions records.

The Criminal Justice Act, 1925, s. 20, enables either party to an appeal against conviction or sentence to apply in writing within seven days for a case to be stated. A recognisance must be entered into.

Where the application of either party for a case to be stated is refused, the High Court may issue an order of mandamus compelling quarter sessions to grant the application if the appeal from the magistrates' court was against a conviction. There is no power to do so otherwise (*R.* v. *Somerset JJ.* [1950] 1 K.B. 519).

Application on behalf of the Attorney-General. Upon application by or on behalf of the Attorney-General a court of quarter sessions is bound to state a case (R.S.C., Ord. 59, r. 33 (note)).

The Court of Criminal Appeal

A person convicted on indictment at quarter sessions may appeal to the Court of Criminal Appeal (1) against his conviction, as of right, on any ground involving a question of law alone, and (2) with the leave of the Court of Criminal Appeal or of the trial judge against his conviction on any ground involving a question of fact alone or mixed law and fact or any other sufficient ground, and (3) with the leave of the Court of Criminal Appeal against his sentence unless such sentence is fixed by law for the offence (Criminal Appeal Act, 1907, s. 3). " Sentence " includes an order for the payment of costs (Costs in Criminal Cases Act, 1952, s. 2; *John Jones*, 16 Cr.App.R. 52). The person convicted must give notice of appeal or notice of application for leave to appeal to the Court of Criminal Appeal within ten days of the date of his conviction or sentence, as the case may be (Criminal Appeal Act, 1907, s. 7 (1)). After conviction and sentence only the Court of Criminal Appeal or a judge thereof can admit an appellant to bail. A parent or guardian ordered to pay a fine, damages or costs under section 55 (1) of the Children and Young Persons Act, 1933, in respect of an offence committed by a child, may appeal to the Court of Criminal Appeal, if the order was made by a court of quarter sessions, as if the parent or guardian himself had been convicted on indictment and sentenced in the terms of the order (s. 55 (5) (*b*)).

By rule 20 of the Criminal Appeal Rules the Registrar shall upon receiving a notice of appeal apply to the proper officer of the court of trial (*i.e.*, the Clerk of the Peace) for the particulars of trial and conviction to be furnished upon Form 2 in the schedule to the Criminal Appeal Act, 1907, together with the other documents in the case.

Determination of appeal. Upon determination, the Court of Criminal Appeal may allow an appeal against conviction upon any proper ground and in any other case shall dismiss the appeal. Provided that notwithstanding that the point raised in the appeal might be decided in favour of the appellant, the court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred (Criminal Appeal Act, 1907, s. 4 (1)). The court may also substitute a verdict of guilty of another offence of which the jury could have found the appellant guilty and pass a sentence suitable to that offence but not greater than that awarded for the offence of which he was convicted (Criminal Appeal Act, 1907, s. 5 (2)). But see *Melvin and Eden* (1953) 37 Cr.App.R. 1, where it was held that where the jury have convicted of receiving but acquitted of larceny on an indictment which charges both offences the court cannot then substitute a verdict of guilty of larceny. A method of avoiding this difficulty has been laid down in *Seymour* (1954) 38 Cr.App.R. 68. On an appeal against sentence the court has power to increase or reduce the sentence under review (Criminal Appeal Act, 1907, s. 4 (3)). Subject to the power to order a *venire de novo* in respect of a technical mistrial, there is no power in the court to order a new trial (*Dyson* (1908) 1 Cr.App.R. 13). Upon determination of an appeal, the Court of Criminal Appeal may order the payment of costs by an appellant *or* out of local funds in a proper case in accordance with section 3 of the Costs in Criminal Cases Act, 1952. By rule 23 of the Criminal Appeal Rules, 1908, an appellant may abandon his appeal at any time after serving notice of appeal by giving notice of abandonment to the Registrar, and the appeal shall thereupon be deemed to have been dismissed by the court. The court will only allow the withdrawal of a notice of abandonment in very special circumstances (*Van Dyn* (1932) 23 Cr.App.R. 150; and see *Healey* (1956) 40 Cr.App.R. 40).

"*Suspected Persons*" *and* "*Reputed Thieves*"

By P. K. L. Danks

Section 4 of the Vagrancy Act, 1824, as amended by the Prevention of Crimes Act, 1871, provides that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto or any street, or any highway or any place adjacent to a street or highway with intent to commit a felony shall be deemed a rogue and a vagabond.

The scope of this offence has always been difficult to decide and in *R.* v. *Dean* [1] Lord Hewart C.J. said:

> "It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824."

The offence will be discussed under the following sub-headings:

(a) suspected person or reputed thief
(b) frequenting or loitering about or in
(c) a street, etc.,
(d) with intent to commit a felony.

Suspected person or reputed thief

The first modern case of interest is *Hartley* v. *Ellnor*.[2] Ellnor was seen near a tram terminus at about 3 p.m. on a Sunday. When a number of people tried to board the tram, he was seen to tap the pockets of several people. He did not attempt to board the tram. He was seen to do this on three separate occasions when trams stopped. He moved to another street and did the same thing four times at another tram stop. He was watched for forty minutes. There was no other evidence to show that Ellnor was a suspected person, and no previous conviction was proved against him. The charge was dismissed on the grounds that, in the absence of any evidence before them showing that Ellnor had been previously convicted or that he was a person of previous bad character, they were not entitled to find that he was a "suspected person." In his judgment Avory J. pointed out that the expressions "suspected person" and "reputed thief" were not synonymous. A person might be a suspected person on a particular day, even though he had not been previously convicted, or even though he had not had a reputation for bad character in the past.

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[1] (1924) 18 Cr.App.R. 134.
[2] (1917) 26 Cox 10.

Ledwith and Another v. *Roberts and Another*[3] was a case in the Court of Appeal concerning wrongful arrest. One respondent went into a telephone kiosk to receive a call while the other waited outside. They were observed for twenty-five minutes and no use was made of the telephone. The respondents were arrested because the appellants suspected that they had been attempting or were about to commit a felony, namely, to steal from the coin box. The respondents said they were waiting for an incoming call; this was later found to be true. The court discussed the meaning of "suspected person" and "reputed thief." Greer L.J. said in the course of his judgment:

> "I do not think . . . that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him. . . . The person so apprehended must be some person who has become suspect, that is to say, some person who belongs to the class of suspected persons by reason of his antecedent conduct. I think 'suspected person' means a person who has acquired the character of a suspect and does not mean whom the apprehending constable suspects to be loitering to commit a felony."

Greene L.J., considering the same point, said:

> "It is said that the allegation that the appellants suspected on reasonable grounds that the respondents were about to commit a felony is a sufficient allegation that they were 'suspected persons.' . . . I am unable to take this view. . . . If correct, it would amount to this, that it is sufficient for a constable to suspect a person on reasonable grounds of being about to commit a felony to justify him in making an arrest. . . . A man is not a reputed thief merely because a constable thinks he is a thief, and I cannot see how a man can be said to be a suspected person merely because a constable suspects him. The phrase 'a suspected person' in

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[3] [1937] 1 K.B. 232; [1936] 3 All E.R. 570.

> this context, particularly when it is placed in juxtaposition to the words ‘reputed thief,’ is, in my judgment, apt to describe and to describe only a person who, quite apart from the particular occasion and antecedently thereto, has become the object of suspicion, just as a ‘reputed thief’ is a person who already has the reputation of a thief.”

In *Rawlings* v. *Smith*[4] the respondent was at various times of the day and in different places looking into, and trying to open the doors of, unattended cars standing in the street. This was observed again and again in the course of the evening. The magistrate was satisfied that the respondent had been loitering with intent to commit a felony. But, in view of the decision in *Ledwith* v. *Roberts*, *i.e.*, that to come within the required class the person must be one who quite apart from the particular occasion and antecedently thereto, had become the object of suspicion, he did not think the respondent came within the class of “suspected person.”

Lord Hewart C.J. pointed out that *Hartley* v. *Ellnor*[2] had not been overruled. All that case had held was that:

> “The defendant . . . must be shown to be a person who belongs to the class of suspected persons, but—and this is the second point—it is not necessary that he should have acquired the status, or have fallen into the category, of suspected persons upon some day earlier than the day which is charged in the information. It is enough if acts antecedent to the act in question occasioning the arrest were of such a kind as to provoke suspicion . . . the suspicion which made the defendant a suspected person was suspicion arising from acts antecedent to the act occasioning the arrest. That seems to me to be the effect of the decision in *Hartley* v. *Ellnor*,[2] and it gets rid of the notion or the proposition that, in order to be a suspected person who can loiter within the meaning of that section, the man must have got into the class of suspected persons on a day earlier than the day of loitering.”

He continued:

> “It is very necessary, in looking at the judgments in *Ledwith* v. *Roberts*,[3] as in all cases, to have regard to the facts which were then being considered, and the essential point of the facts . . . was that one and the same act had been relied upon by the prosecution both as giving rise to the suspicion which was to bring the defendants into the class of being suspected persons, and as being the act which occasioned the arrest. There was one transaction and one transaction only.”

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[4] [1938] 1 K.B. 675; [1938] 1 All E.R. 11.

In *Cohen and Cole* v. *Black* [5] the two accused had over two days been endeavouring to sell to one Collins some clothing. It appeared to a police officer who overheard the accused talking that the real intent was to make Collins produce some money which they could then steal. The appeal to the Divisional Court was on the ground that the accused had not become "suspected persons," but the court, following the judgment of Lord Hewart C.J. in *Rawlings* v. *Smith*,[4] had no hesitation in dismissing it. Oliver J. in his judgment took the matter one stage further by saying:

> "None of us, . . . has any doubt that in law when there is evidence of three police officers jointly observed upon one watching of one person or set of persons, their joint knowledge can be pooled for the purpose of evidence."

In *R.* v. *Fairbairn* [6] it was objected to that a previous conviction of the accused had been admitted in evidence with a view to proving that the appellant came within the category of a suspected person. Lord Goddard C.J. in his judgment said:

> "If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had half a dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions. . . . In the particular case before us the evidence of the police officers was that they saw the appellant and two other men, all of whom they knew to be suspected persons, and the reason why the police knew the appellant to be a suspected person was because he had been previously convicted. He came, therefore, within the category of a suspected person. That, however, would not of itself be enough because a man with previous convictions cannot be arrested for dishonesty merely because he is walking down a street. That, of course, would be absurd. It is necessary to show that a man with a bad character, and known to the police as a person with a bad character, is acting in such a way as to justify an arrest. There was ample evidence in this case . . . because the evidence of the police officers was that they had seen these men peering into motor-cars and trying the doors; in other words, seeing if they could find a motor-car with an open door. If they did it would be a reasonable inference that they intended to take the car and drive it away, or, if not that, to . . . lay their hands on any portable property in the car . . . there is no better evidence that he comes within that category [*i.e.*,

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[5] [1942] 2 All E.R. 299.

[6] [1949] 2 K.B. 690; (1949) 33 Cr.App.R. 179.

> of a suspected person] than proof that he has had one or more previous convictions."

But it was pointed out in *R.* v. *Harris*[7] that if the previous convictions resulted in an order placing the offender on probation or discharging him absolutely or conditionally, section 12 (1) of the Criminal Justice Act, 1948, absolves the offender from legal consequences which otherwise would flow from the conviction. The result is that such a previous conviction cannot be proved in accordance with section 18 of the Prevention of Crimes Act, 1871. In his judgment Humphreys J. thought that:

> " No possible objection . . . could have been taken to the procedure adopted in this case if the detective-constable . . . had been present at the trial and had given evidence to the following effect: 'I was present at the court on the day named when the accused was there. I heard him confess to a charge of having been found in possession of certain implements of housebreaking, and he was then discharged subject to the condition that he commit no offence during the period of twelve months thereafter.' That would have been, not merely proof of a previous conviction, but proof of the appellant's 'known character' in that he was a person who had admitted in a court of justice that he had committed a certain offence."

R. v. *Clarke*[8] took the matter a stage further. In this case Clarke was loitering with intent to commit a felony and also had previous convictions. The point was whether he could be a " suspected person " because he had previous convictions although the arresting officer who had seen the loitering was unaware of them. The court had no difficulty in deciding that on these facts Clarke was a " suspected person," otherwise it . . .

> " would tend to make the provisions of section 4 useless," said Humphreys J., " since a thief might change his venue and the places where he chose to loiter with sufficient frequency to make it unlikely that the local police officers would recognise him or know anything about him."

In *Pyburn* v. *Hudson*[9] the argument reverted to when an act can be considered sufficiently antecedent to bring the accused into the category of a suspected person. The facts of this case were that the respondent was seen at 12.05 a.m. looking with apparent interest at the rear of business premises, and shortly afterwards he was found on some scaffolding which had been erected in the front of the premises to effect repairs. On arrest he admitted he had intended to break into the premises. In his judgment Lord Goddard C.J. said:

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[7] [1951] 1 K.B. 107; [1950] 2 All E.R. 86.
[8] [1950] 1 K.B. 523; [1950] 1 All E.R. 546.
[9] [1950] 1 All E.R. 1006.

> "I should be sorry to attempt to lay down that the acts which cause him to be a suspected person and the act which causes him to be arrested must be separated by any particular length of time. There have been many cases in which police have watched men who have gone round visiting car parks or cars left unattended in the street with the object . . . of helping themselves to property in the cars. If they have acted thus for a length of time, or in such a way that the court thinks that they have by their conduct brought themselves within the category of suspected persons, it matters not whether their acts have been done a quarter of an hour, or half an hour, or, I would say, even five minutes before another act takes place which causes the constable to arrest them. But there must be some act bringing a man within the category of a suspected person, and that act must have occurred before he commits the act which causes his arrest."

Finnemore J. emphasised:

> " . . . it is impossible and undesirable to lay down any sort of time or duration for these antecedent acts, but they must be antecedent."

"*Frequenting or loitering about or in*"

In *Clark* v. *Regina*[10] the word "frequents" was given its ordinary meaning of "to visit often; to resort to often or frequently." As hitherto the courts had been interpreting the word to mean "resorting to," this decision caused a certain amount of consternation. Shortly afterwards Mr. D'Eyncourt at the Westminster police court refused to convict a man of this offence (although he had pleaded guilty) who had been seen in a street attempting to pick pockets. The Birmingham Watch Committee are reported to have "discussed the decision of Mr. D'Eyncourt. . . . The Chief of Police said it was not intended to follow that decision in Birmingham, and the members of the Watch Committee, most of whom were magistrates, expressed their opinion that the London decision was wrong."

As a result of the decision in *Clark* the offence was amended by section 7 of the Penal Servitude Act, 1891, which extended the Act (of 1824) by applying it also to every suspected person or reputed thief loitering about or in any of the said places and with the said intent.

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[10] (1884) 14 Q.B.D. 92.

In *Ledwith* v. *Roberts* [3] Greer L.J. said:

> " I do not think when we are dealing with a criminal matter we ought to interpret the word ' loitering ' in the wide sense of standing or waiting in the street. I think it means loitering in such a way as to indicate that the person was idling in the street for some unlawful purpose."

In *Rawlings* v. *Smith* [4] Lord Hewart C.J., referring to the offence, said:

> " . . . The offence is where a suspected person or reputed thief frequents or loiters . . . with intent to commit a felony. It seems to me that it would be difficult, almost to the point of impossibility, to contend, even for controversial purposes, that one single act could be held to show that a person was loitering or frequenting. The expression seems to involve the notion of something which to some degree, at any rate, is continuous or repeated, and the effect of such a word as ' frequenting ' or ' loitering ' therefore militates against the too harsh view in one aspect of the matter, or too easy view in another aspect of the matter, which might be taken as the meaning of this section."

The place in which the offence took place

Parliament in passing this provision evidently had in mind first the risk of thefts of goods from the kind of places where in those days merchandise awaiting or in course of transport was likely to be lying, *viz.*, places connected with transport by water, substantially the main form of goods transport before railways; and secondly, the danger of pickpockets in or near places of public resort.

It was owing to a narrow construction placed on the section which led to the amendment of the Act in 1871, which provided that the words " or any highway or any place adjacent to a street or highway " were inserted after the words " highway or place adjacent."

A pleasure boat has been held not to be a place of public resort (*R.* v. *Taylor and Jones* [11]) while the following places have been held to be a place of public resort:

Platform of a railway station—*R.* v. *Davis*.[12]

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[11] (1857) 21 J.P. 488.

[12] (1857) 21 J.P. 280.

A private house and garden where a public auction was taking place—*Sewell* v. *Taylor*.[13]

Tattersalls' enclosure at Goodwood Racecourse—*Glynn and Another* v. *Simmonds*.[14]

In this last case Lord Goddard C.J. thought that:

> "A place does not cease to be a place of public resort because the public have to pay to go there. An exhibition is obviously a place of public resort. The Zoological Gardens are, no doubt, a place of public resort because the public are invited to go there, and they enter the gardens on payment of a sum of money. So is a racecourse—not an open course like Newmarket, Brighton or Ascot, but a course in a park."

In *McIntyre* v. *Marton* [15] the entrance hall and staircase of the Central Hotel, Glasgow, which opened directly onto a public street, was held to be a place adjacent to a street or highway within the Act of 1824.

With intent to commit a felony

An essential ingredient of the offence is for the frequenting or loitering to be with intent to commit a felony. The prosecution often has trouble in proving this intent, and section 7 of the Prevention of Crimes Act, 1871, provided "that in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the . . . court before . . . which he is brought, it appears to such . . . court that his intent was to commit a felony."

The object of this Act was to enlarge the powers of courts of summary jurisdiction, and to enable them to infer from the known character of the individual who is brought before them that he was in a particular place with the intention of committing a felony, although there is no direct evidence adduced of any particular act or acts done by him which could be directly pointed to as proving the alleged intent.

It will be remembered that in *R.* v. *Fairbairn* [6] Lord Goddard C.J. said:

> "If a man is found loitering in the street acting in a suspicious manner, and it is established that he has had half a dozen previous convictions, obviously he can rightly be

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[13] (1859) 23 J.P. 792.

[14] [1952] 2 All E.R. 47.

[15] 1912 S.C.(J.) 58.

> regarded as a suspected person by reason of his previous convictions." Lord Goddard immediately continued: " Those previous convictions supply evidence of his intention to commit a felony . . . the evidence of a previous conviction which could by the Prevention of Crimes Act, 1871, be given as evidence of intent is now, by the decision in *Ledwith* v. *Roberts*,[3] clearly also admissible to bring a person within the category of a suspected person."

It is not necessary that the felony which the accused intended to commit should be in the place which he frequented or loitered in, but it is necessary that the purpose of the intent be felonious and not merely immoral or a misdemeanour.

Conclusions

The offence has four ingredients, each of which must be considered separately.

First, the accused must be a " suspected person " or " reputed thief," and this can be proved either by one or more previous convictions, or by showing that he became a suspected person by reason of an act or acts antecedent to the act for which he was arrested. It is a matter of fact in each case whether or not there was an antecedent act.

Secondly, the accused must have been " frequenting," *i.e.*, visiting often, or " loitering," *i.e.*, idling in the street for some unlawful purpose.

Thirdly, the place where the offence took place must be one mentioned in the Act of 1824 as amended.

Fourthly, the intent to commit a felony must be proved. This can be done either by proving a previous conviction, or from the acts which the accused was seen to do, or inferred from his known character.

Having considered the ingredients of this offence it is difficult not to agree with Scott L.J. when he said in the course of his judgment in *Ledwith* v. *Roberts*[16]: " It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when in their historical meaning they are so utterly out of keeping with modern life in England. The class against which the legislation was directed has ceased to exist. The poor law legislation and the increased industrial and commercial employment of the nineteenth century together reduced it to such narrow proportions. The legislation of the twentieth century, unemployment insurance, national health insurance, national assistance, and all the other social reforms of recent years have abolished it altogether. The old phrases have today lost their meaning, but they remain on the Statute-book as vague and indefinite words of reproach. Is it not time that our relevant statutes should be revised and that punishment and arrest should no longer depend upon words which today have an uncertain sense and which nobody can truly apply to modern conditions? To retain such laws seems to me inconsistent with our national sense of personal liberty, or our respect for the rule of law. Clear and definite language is essential in penal laws."

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[16] [1937] 1 K.B. 232; [1936] 3 All E.R. 570.

Practice and Procedure

Central Criminal Court

Joinder of other counts in an indictment for manslaughter

In *R.* v. *Smith and others* (Central Criminal Court: Glyn-Jones J.: November 11, 1957) Smith and Semaine were indicted jointly for manslaughter. In a second indictment, containing four counts, Smith and Semaine were charged with larceny and Candler was charged as accessory after the fact to that offence in count one; Smith and Semaine were further charged with receiving stolen property and Candler was charged as accessory after the fact to that offence in count two; Candler was further charged with receiving stolen property in count three; E. G. Richardson and C. W. Richardson were charged with receiving stolen property in count four.

The witnesses to be called by the prosecution on each indictment were the same and numbered about thirty in all (except that two or three medical witnesses on the manslaughter charge were not required on the other indictment).

Glyn-Jones J. directed that a voluntary bill of indictment be preferred, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) (*b*), against all five prisoners, charging Smith and Semaine with manslaughter in count one and charging all five prisoners in counts two to five with the same offences as had been charged in the four counts of the original second indictment referred to above.

The ground for the decision was that as

(i) there were about thirty witnesses, and
(ii) most of the evidence on each of the original indictments was common to the other,

it would prejudice no one and would be a saving of much time and expense to try all the matters charged in both indictments together.

It was held in the case of *R.* v. *Large* (1939) 27 Cr.App.R. 65 that an indictment for manslaughter should contain no other count.

This was not followed, however, in a case tried earlier this year at the Central Criminal Court before Havers J. when an indictment containing a count for manslaughter and also a count for causing death by dangerous driving was upheld on the ground that the Road Traffic Act, 1956, by creating the latter offence, had brought about a new circumstance not envisaged by the Court of Criminal Appeal in *R*. v. *Large*, *supra*. It is thought that there was a further case in which *R*. v. *Large* was not followed when a count for manslaughter and a count charging the faulty construction of an air-raid shelter were joined in one indictment.

It was held in *R*. v. *Jones* [1918] 1 K.B. 416 that in an indictment for murder no other count should be added.

The reason for the rule laid down in cases of homicide by the two decisions of *R*. v. *Jones* and *R*. v. *Large* is that a man should not be troubled with other matters when in peril on such a grave charge as murder or manslaughter. This rule is of long standing and was merely confirmed in those decisions. See generally on this subject Archbold, 33rd ed., p. 57.

The decision here reported therefore marks a departure from that practice. [M. D. L. WORSLEY, *Barrister-at-Law*.]

Summary Justice

Assault

Assaulting and causing grievous bodily harm to a newspaper photographer; two men sentenced to six months' imprisonment, a third to three months' imprisonment and a fourth fined £50; Welsh: Swindon Magistrates' Court (*The Times*, December 24, 1957).

Assault

Stabbing brother in the back and arm after quarrel about a television set; boy pleaded guilty to charge of assault and causing actual bodily harm; placed on probation for two years, both brothers bound over to keep the peace for two years: Rowley Regis Juvenile Court (*Birmingham Mail*, December 3, 1957).

Highways

Laying paste on the highway to the danger of passers-by; the defendant had been putting up a poster; fined 10s.; Curran: Bootle Magistrates' Court (*Liverpool Echo*, December 18, 1957).

Mines and Quarries

Being in possession of cigarettes in a colliery working contrary to section 66 of the Mines and Quarries Act, 1954; fined £10; Ferguson; Dunfermline (*Liverpool Echo*, December 16, 1957).

Poaching

Having a pheasant trap, charged with pheasant poaching and trespassing contrary to section 2 of the Poaching Prevention Act, 1862; two men each fined a total of £4 with £1 1s. costs; Furness: Coleshill Magistrates' Court (*Birmingham Mail*, December 4, 1957).

Road traffic

Using a motor lorry fitted with an ineffective mirror contrary to reg. 16 of the Motor Vehicles (Construction and Use) Regulations, 1955, and using the lorry for the carriage of goods in connection with his business otherwise than under a licence granted under the Road and Rail Traffic Act, 1933; fined £1 on first count, £5 on second count; Jopson: Appleby Magistrates' Court (*Cumberland and Westmorland Herald*, December 21, 1957).

Case and Comment *

Indecent Assault—*What constitutes an indecent assault?*

WILLIAMS *v.* GIBBS [1] (Q.B. Divisional Court: Lord Goddard C.J., Devlin and Pearson JJ.: December 11, 1957) (*The Times*, December 12, 1957).

The defendant took three girls aged six, five and four years for a paddle. Afterwards the defendant dried the girls, as the result of which the girls made allegations against him. The defendant was charged and convicted by the justices of indecent assault contrary to section 14 of the Sexual Offences Act, 1956, but on appeal quarter sessions held that the drying of the girls did not constitute an assault upon any of them. The prosecutor appealed:—

Held, following *D. P. P.* v. *Rogers* [1953] 1 W.L.R. 1017, that no offence had been committed. It was desirable that conduct such as that of the defendant should be made an offence by Act of Parliament. [D. C.]

COMMENTARY. *D. P. P.* v. *Rogers* followed *Fairclough* v. *Whipp* [1951] 2 All E.R. 834, which is based on the proposition that where A invites B to touch him and B does so, that cannot be an assault upon B. "I cannot hold," said Lord Goddard, "that an invitation to somebody to touch the invitor can amount to an assault on the invitee." *Rogers* was a similar case, where the act was done to the accused, at his invitation, by a child. The present case goes further because the act was done by the accused to the little girls, and seems to be inconsistent with a dictum of the Lord Chief Justice in *Fairclough* v. *Whipp*: "If that which was done to this child was of an indecent nature and would have been an assault if done against her will, it would also be an assault if it was done with her consent because she could not consent to an indecent assault." (A girl under the age of sixteen cannot, in law, give any consent which would prevent an act being an assault for the purposes of section 14.) It is submitted, with respect, that the present case is an unfortunate and unnecessary extension of *D. P. P.* v. *Rogers*.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the appellant: *D. Morgan Hughes* (instructed by Gibson & Weldon for Hugh Carswell, Chester). For the defendant: *D. Lloyd Jones* (instructed by Sheldon, Plant & Loveridge, Congleton).

Larceny by a Bailee—*Bailment of cheque—money entrusted for specific purpose*

R. *v*. HASTINGS [2] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 18, 1957).

H. was convicted at a Crown Court of, *inter alia*, larceny as a bailee. The facts were that one D. was in possession of a motor-vehicle on hire-purchase and was desirous of transferring the hire-purchase rights to one W. H. was engaged on behalf of his firm, the A. A. Association, to arrange that transfer. For the purpose of this transaction, W. drew a cheque for £200 in favour of the A. A. Association which he gave to H. The cheque was duly indorsed by H. and his partner and was paid into the firm's bank account. Subsequently the proceeds of the cheque were misapplied by H. H. was convicted of larceny of the sum of £200 as a bailee. On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that if H. had been charged with fraudulent conversion there would have been no defence. H. could not properly be convicted of larceny as a bailee because, if there was a bailment of the cheque itself, there was no misapplication of it. A sum of money, unless it was a specific coin or a specific instrument, could not be the subject of this charge. Further a bailment required the bailee to return, or to deliver to somebody else, the article *in specie* and it followed that there was no bailment in the present case where H. was expected to convert the cheque into something else by paying it into his firm's bank account. The appeal would, therefore, be allowed. [H. P.]

COMMENTARY. It would seem clear that there was no bailment of the cheque because W. intended to part with his ownership in it, to the firm in which H was a partner. If there was no bailment of the cheque, *a fortiori* there was no bailment of the money.

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[2] For the appellant: *Henry Palmer* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. J. Bean* (instructed by the Town Clerk, Liverpool)

Archbold, at p. 565, referred to.

Receiving Stolen Goods—*Evidence of dishonesty*

R. *v*. AUSTIN[3] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 2, 1957) (*The Times*, December 3, 1957).

A. was convicted at quarter sessions of receiving stolen goods knowing them to have been stolen. At the trial a question was put to A. in cross-examination relating to a previous offence of submitting an incorrect income tax return. On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that the only question that worried the court was whether or not the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied in this case. A. had not put his character in issue at the trial, yet a question was put to him in cross-examination to show that he had been convicted on a previous occasion. Since A. had merely been fined £6 it looked as if the court had not taken a very serious view of that previous offence. Nevertheless the question was put as evidence of dishonesty, and this was a case in which the issue of honesty—whether A. knew the goods were stolen—was all-important. The court felt that the only safe thing to do was to quash the conviction. [H. P.]

COMMENTARY. Under the Criminal Evidence Act, 1898, s. 1 (*f*), a person charged and called as a witness shall not be asked and, if asked, shall not be required to answer any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, except in the circumstances specified in the section.

Road Traffic—*Overtaking—relevance of Highway Code*

WHITE *v*. BROADBENT AND BRITISH ROAD SERVICES[4] (Court of Appeal: Jenkins, Sellers and Pearce L.JJ.: November 28, 1957) (*The Times*, November 29, 1957).

The second defendants' motor-lorry was driven by their servant B. into a position in the centre of the road, ready to turn to the right. B. looked to the front and saw nothing. B. looked into his mirror and saw the first defendant's van coming from the rear, and he made the "ready to be overtaken" signal in the form on the top left-hand part of p. 16 of the Highway Code. The plaintiff was in fact crossing the road in front of the lorry. She emerged into the path of the van and despite the first defendant's efforts to avoid her, she was struck by the van and injured. Davies J. found that the plaintiff had started to cross the road when B. gave his signal and that B. was negligent in failing to see her. He held the first defendant and the second defendants, as between themselves, respectively 20 per cent. and 80 per cent. to blame. The second defendants appealed:—

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[3] For the appellant: *D. Weitzman Q.C., P. Weitzman* (instructed by Messrs. Sales & Phelps). For the Crown: *John Hazan* (instructed by The Solicitor, Metropolitan Police).

[4] For the appellants: *R. Marven Everett Q.C.* and *J. Michael Dodson* (instructed by Willey, Hargrave & Co., Leeds). For the first defendant: *R. Withers-Payne* (instructed by Bromley & Walker, Leeds). For the plaintiff: *T. Richard Nevin* (instructed by Ramsden, Sykes & Ramsden, Huddersfield).

Held, that B. was performing an operation which it was his duty to perform at all stages without exposing other road users to unnecessary risk, and with reasonable care, and that in view of the judge's finding, that if B. had been keeping a proper look-out he would have seen the plaintiff, B. had owed that duty to the plaintiff, and that the appeal failed. The "ready to be overtaken" signal was not an authority to the overtaking vehicle to pass, but was likely to result in the overtaking vehicle coming up faster than it might otherwise do and was fraught with danger to anyone acting as the plaintiff had done. [D. C.]

COMMENTARY. This case, being an action in tort, has no direct bearing on the criminal law. It is, however, an indication that conduct such as that of B. might be held to amount to evidence of driving without due care and attention. In applying for leave (which was refused) to appeal to the House of Lords, counsel for B. is reported to have said that their Lordships' decision made the Highway Code a trap for the unwary. It is submitted, with respect, that there is some truth in this observation.

Summary Trial—*Power to commit for trial*

R. *v*. IBRAHIM AND OTHERS [5] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 10, 1957) (*The Times*, December 11, 1957).

I., together with three others, was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm. All the accused had elected to be tried summarily. At the magistrates' court the accused had been charged with unlawful wounding; the facts had been told to the magistrate and the prosecution had consented to the case being tried summarily and the accused had so elected. The magistrate then proceeded with a view to summary trial but, after hearing the opening of the prosecution, he decided to commit the accused for trial on the charge of wounding with intent to do grievous bodily harm. The appellants appealed to the Court of Criminal Appeal on the ground that the magistrate had " begun to try " the case and, therefore, under section 24 of the Magistrates' Courts Act, 1952, he was bound to continue the trial:—

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[5] For the appellant: *J. O. Haines* (instructed by A. W. Kemp, Esq.). For the Crown: *John Hazan* (instructed by the Solicitor, Scotland Yard).

Held, dismissing the appeal, that the whole question was whether it was too late for the magistrate to change his mind. The case was entirely covered by *R.* v. *Craske* [1957] 3 W.L.R. 308, which was a decision of the Divisional Court and not technically binding on this court. In that case it was held that the magistrate had not " begun to try " a case within the meaning of section 24 until he had begun to hear evidence. The only distinction between the *Craske* case and the present case was that in the former the magistrate had merely received the accused's plea, and in this case the magistrate had heard the opening speech for the prosecution. Nevertheless, the magistrate in the present case decided to commit before he had heard any evidence and the convictions would, therefore, be affirmed. [H. P.]

COMMENTARY. See *R.* v. *Suleyman* [1957] Crim.L.R. 819 for proceedings at the Central Criminal Court. See also [1957] Crim.L.R. 601, where it is pointed out that the decision in *R.* v. *Craske* was founded largely on the proposition " that an accused person should not be deprived of his right to be tried by a jury unless the law clearly intended that consequence to follow inevitably from some incident in the proceedings." In the present case, far from depriving an accused of his right to jury trial, the court was forcing it on an accused who wished to be tried summarily. But the result is, nevertheless, the logical consequence of the decision in *Craske*.

Summing-up—*Misdirection on fact*

R. *v.* CAMERON [6] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 9, 1957) (*The Times*, December 10, 1957).

C. was convicted at quarter sessions of housebreaking and larceny. The case for the prosecution at the trial was that C. had broken into the premises of his employer and stolen £60, and that he afterwards changed thirty £1 notes at a bank into £5 notes. C. was identified by two witnesses and, when questioned by the police, was found to have £37 in his possession including two £5 notes.

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[6] For the appellant: *C. Ingram Poole* (instructed by Messrs. Barnes & Butler for J. W. Miller & Son, Poole). For the Crown: *R. Stock* (instructed by Sharpe, Pritchard & Co. for Mr. C. P. Brutton, County Solicitor, Dorset).

On appeal to the Court of Criminal Appeal on the ground of misdirection: —

Held, allowing the appeal, that the case was a thin one because the first identification was doubtful and the second conflicted with evidence given by another witness for the prosecution. In addition the recorder in his summing-up had laid great stress upon C.'s possession of two £5 notes and said that this was " on any showing a damning piece of evidence." This direction would have misled the jury as to the real point of the case; the possession of two £5 notes was perfectly consistent with C.'s innocence. On a thin case of this sort it was quite vital, if the verdict of the jury was to be upheld, that there should be no substantial serious misdirection or non-direction on any question of fact. In the opinion of the court, there had been such a misdirection and, accordingly, the conviction was quashed. [H. P.]

Verdict—*Illogical—duty of judge to redirect*

R. *v*. SWEETLAND AND ANOTHER [7] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 19, 1957).

S. and another were tried at the Central Criminal Court on an indictment containing five counts. The first count charged a conspiracy to cheat and defraud S.-M., Ltd. by false pretences, and the remaining four counts charged specific instances of obtaining sums of money from S.-M., Ltd. with intent to defraud by false pretences. The accused were acquitted of count one and convicted on the other four counts. Counsel for the defence then asked the recorder for a certificate for appeal on the ground that the verdict was inconsistent. The following dialogue then took place: —The recorder, " Perhaps, Mr. Foreman, you could just elaborate. Do I gather that you find them guilty of participating in these charges but without agreeing to do so? " The foreman, " We find they did not initiate it." The recorder, " That is what you mean by that? " The foreman, " By conspiracy we find they did not initiate it. They were perhaps unwittingly originally involved." The recorder, " It may be said that your verdict is inconsistent. I want to give you the chance of explaining it. You found them guilty of being concerned in these charges together but when you say they did not conspire did you mean they did not initiate it? " The foreman. " No, sir." The recorder, " That is what you mean." The foreman, " Yes, sir." On appeal to the Court of Criminal Appeal: —

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[7] For the appellants: *Edward Clarke* (instructed by Prothero & Prothero). For the Crown: *J. H. Buzzard* (instructed by The Solicitor, Metropolitan Police).

Held, allowing the appeal, that the verdict was on the face of it that the two appellants were not agreeing to cheat and defraud S.-M., Ltd. by false pretences but that on certain specific occasions they did defraud S.-M., Ltd. of money by false pretences. In the particular circumstances of this case it was difficult to see how the appellants could be acquitted of conspiracy and yet found guilty jointly of these specific acts. However, the court was not laying down that wherever a verdict of not guilty was returned on a conspiracy count and verdicts of guilty returned on other counts in the same indictment, or vice versa, that the verdicts were necessarily inconsistent. Each case must depend upon its particular circumstances; and in the present case there appeared to be an inconsistency in the verdicts. The recorder had been quite right to put questions to the jury but, as the answers of the jury were not entirely satisfactory, the recorder ought to have given a further direction on the matter. It looked as though the jury were saying: "We think these two defendants at some time knew all about this fraud and were assisting in carrying it out although they did not originate it." If the jury had then been directed that people who joined in a conspiracy after its origin were just as guilty in law as the originators, the jury might well have returned and found the appellants guilty of conspiracy; but it was unsafe to speculate as to what the jury might have found. The conviction would, therefore, be quashed. [H. P.]

COMMENTARY. A conspiracy to commit a crime does not merge in the completed crime and therefore it is perfectly possible for a man to be convicted of both the ulterior crime and a conspiracy to commit it. Where the only evidence of conspiracy is the collaboration of the parties in the commission of the ulterior crime, the only logical verdicts will usually be either guilty of both the conspiracy and the ulterior crime, or not guilty of both. In *R.* v. *Cooper and Compton* (1947) 32 Cr.App.R. 102, which was such a case, the court quashed a verdict of guilty of conspiracy as inconsistent with a verdict of not guilty of larceny. Conversely, in *R.* v. *Beach and Owens* [1957] Crim.L.R. 687, a verdict of guilty of attempt to pervert the course of justice was quashed as inconsistent with a verdict of not guilty of conspiracy.

Witness—*Cross-examination as to previous oral statement*

R. *v*. HART [8] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Pearson JJ.: December 18, 1957).

H. was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm. At the trial the case for the prosecution was that H. had attacked and severely wounded a man with a knife. The case for the defence was that the wounded man was attacking H. with a bottle and that the wound was accidentally inflicted. There were two witnesses of the incident, C. and D. C. gave evidence for the prosecution and said that the wounded man had no bottle; he was cross-examined as to a previous oral statement when he had told D. that the wounded man had had a bottle. D. was called as a witness for the defence and, when he was asked about his conversation with C., the trial judge refused to admit the evidence. As to the bottle, D. did not say that he saw the bottle but that he heard a bottle breaking. On appeal to the Court of Criminal Appeal:—

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[8] For the appellant: *P. M. Blomefield* (instructed by Male & Wagland, Hayes). For the Crown: *S. H. Noakes* (instructed by The Solicitor, Metropolitan Police).

Held, dismissing the appeal, that the provision under which the evidence of the conversation was sought to be made admissible was section 4 of the Criminal Procedure Act, 1865. That section provided that if a witness gave evidence of a fact that was relevant to the crime there could be put to him that he had made some previous contradictory statement to somebody else, and, if he denied it, that somebody else could be called. This court thought that the trial judge had thought that that section applied only to previous statements on oath or in depositions or in some form of writing and that in this respect the trial judge was clearly wrong. The evidence was, therefore, wrongly excluded, but this was the clearest possible case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907. In the first place it was far from certain that the question of the bottle was in any way decisive. Secondly, assuming that the jury attached importance to that question, it was for the jury to decide between the evidence of C. and D. If this conversation had been proved the jury would have had to make up their minds between C. and D. Accordingly, the court would apply the proviso to section 4 (1), on the ground that there had been no miscarriage of justice, and would dismiss the appeal.

[H. P.]

COMMENTARY. The general rule is that where a witness is cross-examined as to credit and he denies any matter which is put to him, his denial must be treated as conclusive—*i.e.*, the cross-examining party is not allowed to adduce evidence to rebut his denial. So in *R.* v. *Holmes* (1871) L.R. 1 C.C.R. 334, a case of indecent assault, it was held that the prosecutrix, having denied that she had had connection with another man, could not be contradicted by rebutting evidence. It is otherwise if the question put in cross-examination is relevant, not merely to credit, but to a matter actually in issue: *R.* v. *Riley* (1887) 18 Q.B.D. 481, a case of rape, where it was held that the prosecutrix, having denied that she had previously had voluntary connection with the *prisoner*, could be contradicted; this question going not merely to credit, but to the issue of consent.

Section 4 of the Criminal Procedure Act, 1865 (which applies to civil, as well as criminal proceedings), creates an exception to the general rule. The evidence in the present case was clearly admissible under this section. Presumably, however, its only relevance was its tendency to show that C was not to be believed on his oath, and it was not relevant to establish that D in fact had a bottle. " . . . it is one thing to say that, in view of an earlier statement, the witness is not to be trusted: it is another to say that his present testimony is to be disbelieved and his earlier statement, which he now repudiates, is to be substituted for it"—*per* Hewart L.C.J. in *R.* v. *White* (1922) 17 Cr. App.R. 60, 64, a case on section 3 of the Act of 1865. *Cf. R.* v. *Fraser and Warren* [1957] Crim.L.R. 51.

Letters to the Editor

Formulating a Charge of Breaking and Entering

Sir,

I noted with interest the point of practice reported by Mr. Alan Lees from Cheshire Quarter Sessions, in the December issue, but was surprised at the decision of the learned Chairman.

The practice apparently complained of is done regularly in London in cases of burglary, both at the Central Criminal Court and at the County of London Sessions, and is considered to be good practice.

The procedure is entirely in accordance with the provisions of section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and provided an intent to steal appears from the depositions the accused cannot be said to have been prejudiced thereby.

At the magistrates' court he is fully informed of the charge then preferred against him. He cannot be told of the exact wording as laid in the indictment because the indictment has not at that time been drawn, and in any case that is not required by rule 5 (3) of the Magistrates Courts Rules, 1952.

Yours faithfully,

CYRIL HORSFORD.

County of London Sessions.

Acts and Orders*

British Commonwealth

JUDICIAL COMMITTEE (GHANA) ORDER, 1957 (S.I. No. 2165): operative December 13, 1957. The Supreme Court of Ghana is named as one of the superior courts of Her Majesty's dominions for the purposes of the Judicial Committee Amendment Act, 1855. The effect is that any person having been Chief Justice or a judge of the Supreme Court of Ghana, who is a member of the Privy Council, shall be a member of the Judicial Committee of the Privy Council.

UGANDA (POLICE SERVICE COMMISSION) ORDER IN COUNCIL, 1957 (S.I. No. 2167): operative on a day to be appointed. Provision is made for the establishment of a Police Service Commission for Uganda.

Civil Aviation

AIR NAVIGATION (RADIO) (THIRD AMENDMENT) REGULATIONS, 1957 (S.I. No. 1976): operative November 20, 1957. The principal Regulations (S.I. 1954, No. 900; [1954] Crim.L.R. 726) are amended by substituting revised Visual, Colour Perception and Hearing standards to be applied to applicants for the grant or renewal of First Class Flight Radiotelegraphy Operators' Licences (Temporary and Otherwise) and by the deletion, in order to take account of the provisions of the Air Navigation (Fifth Amendment) Order, 1957 (S.I. 1957, No. 278), which relates to flying hours.

For penalties for contravention, see Article 67 of the Air Navigation Order, 1954 (S.I. 1954, No. 829).

Food and Drugs

FOOD HYGIENE (AMENDMENT) REGULATION, 1957 (S.I. No. 2157): operative December 31, 1957. Regulation 7 of the principal Regulations (S.I. 1955, No. 1906); [1956] Crim.L.R. 133) is amended. The operation of the original Regulation 7 (which restricts the giving out of food for preparation or packing in domestic premises) had been postponed in relation to shrimps, prawns and onions until January 1, 1958. The new regulation 7, which is to apply to shrimps, prawns and onions on June 1, 1958, permits these foods to be given out for packing on domestic premises provided the premises are registered, for the purpose of preparing the food in question, with the local authority under section 16 of the Food and Drugs Act, 1955, and provided also certain other requirements are complied with. These other requirements include (a) a periodic check by the person giving out the food that the worker is able to maintain proper standards; (b) the provision of a water supply and wash-hand basin; (c) the cleanliness of equipment and premises; (d) the protection of food from risk of contamination; and (e) the observance of cleanly practices by persons engaged in the handling of the food, and action to be taken where they suffer from or are the carriers of certain infections.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

For penalties for contraventions, see regulation 33 of the principal Regulations.

London

The following Orders have been made detailing prescribed routes: S.I. No. 2063 (Richmond): S.I. No. 2153 (Paddington).

Magistrates' Courts

The following Orders have been made altering petty sessional divisions: S.I. No. 2102 (Lancashire): S.I. No. 2211 (East Suffolk): S.I. No. 2041 (Montgomeryshire).

Pest Control

IMPORTATION OF POTATOES ORDER, 1957 (S.I. No. 2209): operative December 25, 1957. The restrictions imposed by the Importation of Plants Order, 1955 (S.I. 1955, No. 81; [1955] Crim.L.R. 196) on the importation into England or Wales of maincrop potatoes grown in 1957 in Belgium, France or the Netherlands, are modified.

For penalties for contravention, see section 1 of the Destructive Insects Act, 1877.

Road Traffic

TRAFFIC SIGNS (AMENDMENT) REGULATIONS, 1957 (S.I. No. 2149): operative January 1, 1958. The principal Regulations (1957 S.I. No. 13; [1957] Crim.L.R. 264) are amended. The main changes are (1) where the sign " Halt at Major Road Ahead " (shown in diagram 204 of the First Schedule to the principal Regulations) is illuminated by lighting, and such lighting is arranged so that it also illuminates the surmounting ringed triangle, the ringed triangle need not be fitted with red reflectors, and (2) four new traffic signs are prescribed.

Traffic Signs General Directions (No. 2) 1957 (S.I. No. 2150): operative January 1, 1958. The principal Directions (S.I. 1957, No. 13; [1957] Crim.L.R. 264) are amended. The main changes are (1) it is provided in regard to certain signs which could be placed only at sites approved by the Secretary of State or the Minister of Transport and Civil Aviation that this restriction shall only now apply to such of those signs as indicate the effect of an Order made by the Secretary of State or the Minister or Regulations made by the Minister and (2) the use of the carriageway marking " Slow " to supplement direction signs erected in advance of a road junction is now permitted.

Scotland

Traffic Regulation Orders (Procedure) (Scotland) Regulations, 1957 (S.I. No. 2038): operative December 2, 1957. The Regulation and Restriction of Road Traffic (Procedure) Regulations, 1931 (S.R. & O., No. 486), in so far as the same are still in force, and the Regulation and Restriction of Road Traffic (Procedure) Provisional Regulations, 1934, are superseded. These earlier Regulations are re-enacted with amendment, the main difference being that there is now prescribed the procedure to be followed in connection with the making by local authorities under section 46 of the Road Traffic Act, 1930, of Orders regulating traffic on roads which, by reason of subsection (3) of section 33 of the Road Traffic Act, 1956, do not require confirmation by the Secretary of State.

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

41. *Lotteries on licensed premises*

A publican wishes to allow a small society to draw a weekly lottery on his licensed premises, and I am informed that all lotteries whether legal or not are gaming, and therefore an offence against section 141, Licensing Act, 1953, would be committed. Although there are a number of cases to support this I am not convinced that perfectly legal lotteries (another one is now permitted by the Small Lotteries and Gaming Act, 1956) are intended to be gaming and thus prevented on licensed premises.

If this is so then all lotteries held at hotels, public functions, dance halls, etc., and even police balls, where there is a licence to sell intoxicating liquor are illegal.

Please give your views on these points. [L. H. G.]

Answer

I do not think the publican will be committing an offence against section 141 of the Licensing Act, 1953, if the lottery he allows to be held on his premises is a lawful one, *e.g.*, within the provisions of the Small Lotteries and Gaming Act, 1956.

It is quite true that the 1956 Act does nothing to relieve from liability the holder of a justices' licence (including an occasional licence) who allows unlawful games or gaming on his premises contrary to section 141 of the Licensing Act, 1953; but in my opinion the holding of a lottery is *not* gaming, and a distinction must be made between the two activities.

The holding of lotteries and "draws" may, in itself, be an offence under the Betting and Lotteries Act, 1954 (and under earlier statutes repealed by that Act), but certain exceptions were made in the case of small and "private" lotteries and the scope of these exceptions has been extended by the 1956 Act.

For these reasons I do not think any offence is committed by the holding of the usual type of small raffle or draw which takes place at public functions, including police balls. It is also pertinent to add that in many cases the offences which might be committed by publicans would probably be regarded as *de minimis*. Thus, strictly, according to the letter of the law, it is undoubtedly an offence against section 141 of the Licensing Act to play a game of darts on the terms that the loser will buy his opponent a half-pint of beer, since this is "gaming" (see *Danford* v. *Taylor* (1869) 20 L.T. 483). But it is inconceivable that any prosecution would be brought if the players were, in effect, having a friendly stake on the result. [M. D.]

Books and Periodicals

Reviews:

Suddenly at the Priory. By John Williams. London: Heinemann & Co. 1957. 297 and (index) 6 pp. (25s. net.)

Mr. Williams' far-reaching conclusion makes sure that this book cannot be dismissed as just another reconstruction of the death of Charles Bravo. If you are already familiar with the Priory and its secrets which at once delighted and scandalised Victorian England, the new solution presented by Mr. Williams will stimulate you to new thought, but it is to be doubted whether this book can be recommended to someone who is a stranger to the story. Florence, Charles and Mrs. Cox, its central figures, remain throughout just a matter of a few descriptive words put unconvincingly on paper. The opportunity to make them emerge as real people, reliving their respective parts, in a way which enables the conclusion, albeit a strange one, to reveal itself naturally and reasonably is sacrificed. All that we have is a cold documentary with a sensational last word on the death, not only of Charles but also of his wife, Florence, and of her first husband.

J. D.

Books Received:

Protection from Power under English Law. By Lord MacDermott. Hamlyn Lectures, Ninth Series. London: Stevens & Sons. 1957. 196 pp. (16s. 6d. net.)

Come To Prison. By Sewell Stokes. London: Longmans, Green & Co. 1957. 224 pp. (21s. net.)

F.B.I. Story. By D. Whitehead. London: Frederick Muller Ltd. 1957. (30s. net.)

Readers' Digest:

Hire-purchase: Criminal offences in relation to hire-purchase: 121 *Justice of the Peace* 789.

Homicide: Murder and implied malice: 107 *Law Journal* 807.

Police: Police advocacy: 65 *Police Review* 888.

Probation: The further offence whilst on probation: 122 *Justice of the Peace* 3.

Quarter sessions: Recommittals to quarter sessions: 121 *Justice of the Peace* 788.

Road traffic: Criminal negligence in motor driving: 225 *Law Times* 5.

Warrants: The execution of warrants: 65 *Police Review* 916.

THE
CRIMINAL LAW REVIEW

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Editorial

Crimes of violence

The increase in crimes of violence has led to a number of questions being asked in the House of Commons concerning the reintroduction of corporal punishment into our penal system. To date, the Home Secretary has steadfastly refused to consider the idea, and has produced statistical evidence to show that corporal punishment never had the great deterrent value attributed to it.

Certain Members of Parliament, however, are undeterred. A motion has been tabled by two of these, seeking to amend the Criminal Justice Act, 1948, and the Homicide Act, 1957, so as to enable the courts to inflict corporal punishment for all crimes of violence and capital punishment. Sixteen other Members have added their names to this motion.

An amendment to this motion proposes the setting-up of a committee to investigate the causes of the increase in crimes of violence and of murder, and to make recommendations.

The prevention of crime

A general public worried, as the " great British public " must be, by constant reports of increasing crime[1] must welcome the news that Scotland Yard has set up an Inter-Departmental Crime Committee whose sole concern will be the prevention of crime.

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[1] See [1957] Crim.L.R. 560 ; [1958] Crim.L.R. 3.

The committee's function will be to inquire into the methods used in the Metropolitan Police District for reducing crime, and to make recommendations as to how these methods could be improved upon.

The present commander of the administration department, Commander A. Townsend, is to be chairman of the committee: the crime officer will be Deputy Commander W. Rawlings; Detective-Chief Superintendent E. R. " Flaps " Daws will represent the research and planning department. Other members will be the civilian executive officer in charge of the statistical branch, and a uniformed superintendent from the administrative branch.

Where ignorance is bliss . . .

After a band of a thousand Indians had broken up a Klu-Klux-Klan rally in North Carolina, a police chief at Maxton, the nearest town, said, when asked why he and his men had not gone out to stop the fighting, " We don't know nothing about nothing."

Corrigendum

Professor J. C. Smith has pointed out that the hypothetical case given by him in his article " Larceny and False Pretences " [1958] Crim.L.R. 92 at p. 99, omits the important fact that A has no account with the C bank.

Parliament

Discharged prisoners

The Home Secretary has invited the Advisory Council on the Treatment of Offenders to consider the problem of prejudice to the relationship between discharged prisoners and the Central After-Care Association resulting from the " police function " which the society has to perform to give effect to the provisions of section 29 of the Prison Act, 1952 (H.C. Debates, Vol. 580, col. 196, January 23).

Identity parades

In reply to a question suggesting that photographs of identity parades should be taken so that juries can consider them and thus possibly avoid wrongful convictions, Mr. Butler said, in effect, that the present precautions against unfairness are quite adequate and that, in any case, the police have no power to photograph persons taking part in an identity parade with their consent, and they might well object to such a practice (H.C. Debates, Vol. 581, col. *1340,* February 6).

Suicide and attempted suicide

The Home Secretary said that he is not satisfied that any change in the law relating to suicide and attempted suicide is necessary. He stated that the concept of suicide as a crime had its roots in religious belief, and that he had no evidence that an alteration of the basic concept would be universally acceptable to public opinion (H.C. Debates, Vol. 581, col. *1332,* February 6).

Judicial appointment

Harold John Brown, Esq., M.C., Q.C., has been appointed Recorder of the Borough of King's Lynn.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Fitness to Plead and the Criminal Lunatics Act, 1800

By S. Prevezer, M.A., LL.M.
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The introduction last year of diminished responsibility as a mitigation or partial defence to a charge of murder,[1] and the recent decision of Devlin J. in *R.* v. *Kemp*,[2] have served to focus attention once more on the issue of insanity at the time of the act. Quite apart from its wide and somewhat novel interpretation of the M'Naughten Rules, the decision in *Kemp* is important because it revises the traditional view that the issue of insanity at the time of the act must be raised by the accused or on his behalf, so as now to permit the judge or prosecution to raise the issue once the defence has led evidence of insanity. As Mr. Edward Griew has pointed out in a valuable article in this *Review*,[3] this may be crucial in what he terms "the overlap case" when a person, insane within the meaning of the M'Naughten Rules, chooses to plead diminished responsibility to a charge of murder.

Little attention, however, is generally directed to another aspect of insanity which becomes important at an earlier stage in the legal proceedings, though it is concerned with the accused's state of mind at a later point in time, that is insanity as it may affect his fitness to plead on arraignment. Curiously enough, the problem as to who may raise the issue of fitness has now resulted in a direct conflict of judicial opinion, with Devlin J. in *R.* v. *Roberts* this time favouring the defence,[4] and Byrne J. in *R.* v. *Beynon* favouring the prosecution.[5] One result of the conflict is that this particular problem has been clearly exposed for the first time in this country, a fact which is perhaps surprising when it is remembered that the issue is of ancient origin and wide application;

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[1] Homicide Act, 1957, s. 2.

[2] [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249; [1956] Crim.L.R. 774.

[3] "Diminished Responsibility and the Trial of Lunatics Act, 1883" [1957] Crim.L.R. 521–529. There is no explicit statement by Devlin J. in *Kemp* as to the right of the judge or prosecution to raise the issue though the effect of the decision appears to be as stated above. Hall Williams interprets the decision more narrowly as implying "That by raising the defence of unconscious conduct the accused may be taken to raise the issue of insanity" (20 M.L.R. 55 at p. 57). If the broader view is taken, the principle may be useful where the accused sets up a defence of mistake which is in fact founded upon an insane delusion.

[4] [1954] 2 Q.B. 329; see further [1954] Crim.L.R. 20–22.

[5] [1957] 2 Q.B. 111; [1957] Crim.L.R. 472.

indeed, of the 3,130 persons committed for trial on a charge of murder between the years 1900 and 1949, no fewer than 428 were found insane on arraignment.[6] What constitutes fitness to plead and what procedure should be followed are questions worth considering.

What constitutes fitness to plead?

Although the question of fitness to plead has to some extent been governed by statute since 1800,[7] it is clear that some common law provision existed long before that date. Thus, Hale's *Pleas of the Crown* state that "If a man in his sound memory commits a capital offence and before his arraignment becomes absolutely mad, he ought not by law to be arraigned during such his phrensy but be remitted to prison until that incapacity be removed. The reason is that he cannot advisedly plead to the indictment."[8] Though the list of capital offences at that time was extensive, it may be doubted whether the application of the principle was even then limited to capital offences committed when of sound memory by persons who subsequently became "absolutely mad," and in 1876 Chief Baron Kelly stated: "I believe it to have been the law from the earliest times that if it is found at the trial of a prisoner that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial or order a verdict of not guilty."[9]

In 1800, the Criminal Lunatics Act, passed in consequence of *Hadfield's* case,[10] provided, *inter alia,* that "if any person indicted for any offence shall be insane and shall be found so by jury on arraignment lawfully empanelled for that purpose, it shall be lawful to record such verdict and order him to be kept in strict custody. . . ." This provision, which is still in force, and results in the prisoner being sent to Broadmoor, merely states the procedure for dealing with insane persons but does not provide which persons are to be deemed insane, and the statute has recently[11] been said to be declaratory of the common law. Certainly, the M'Naughten test of irresponsibility, propounded in 1843, is entirely inappropriate, and the test of fitness has traditionally been interpreted, in slightly varying forms, as one of understanding and ability to take part in the trial. In *R.* v. *Pritchard*,[12] in 1836, the jury was directed to determine whether the accused was of sufficient intellect (i) to comprehend the course of the proceedings so as to make a proper defence, (ii) to challenge any juror he might wish to object to, and (iii) to comprehend details. This form of direction has become fairly standard and the decision has often been cited with approval.[13] As one might expect, a certain degree of latitude has been allowed in interpreting the jury's finding as one of insanity: in *R.* v. *Governor of H.M. Prison at Stafford, ex p. Emery*,[14] the jury found the accused incapable of pleading to the charge, of taking his trial and of understanding and following the proceedings, by reason of his inability to communicate with and be communicated with by others. It was held that this amounted to a finding that he was insane within the meaning of the Act. Conceding that it was perfectly true that the words " inability to plead," " inability to understand the proceedings," and " inability to communicate with other persons," were not to be found in the Act, Lord Alverstone referred with approval to the decision in *Pritchard*,[15] and to the direction to the jury of Parke J. in the earlier case of *Dyson* [16] that " if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." Similarly, it was said of yet another case [17] that " there was no question there of general insanity but only of insanity from the point of view of not understanding the nature of the proceedings." [18]

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[6] See Cmd. 8932, para. 220.

[7] Criminal Lunatics Act, 1800, s. 2.

[8] 1 Pleas of the Crown at p. 34.

[9] *R.* v. *Berry* (1876) 1 Q.B.D. 447 at p. 451.

[10] 27 St.Tr. 1281.

[11] *R.* v. *Beynon* [1957] 2 Q.B. 111 at p. 116; [1957] Crim.L.R. 472.

[12] (1836) 7 C. & P. 304.

There has been little judicial discussion of what types of mental illness may render the accused unfit to plead, though Devlin J. has stated recently that " It is clear from the authorities that it is not merely defects of the mind which may bring about that result. Defects of the senses, whether or not combined with some defect of the mind, may. . . ." [19] Sometimes, as in *R.* v. *Rivett*,[20] strong medical evidence of schizophrenia, sufficient to convince all the doctors who testified that the accused is insane, may fail to convince the jury that he is unfit to plead. On the other hand, where the offence charged is less than murder, and may entail only a comparatively short period of imprisonment (which the accused is sane enough to prefer to the possibility of life detention in

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[13] See, *e.g.*, *R.* v. *Governor of H.M. Prison at Stafford, ex p. Emery* [1909] 2 K.B. 81; *R.* v. *Roberts* [1954] 2 Q.B. 329.

[14] [1909] 2 K.B. 81.

[15] (1836) 7 C. & P. 304.

[16] (1831) 7 C. & P. 305n.

[17] *R.* v. *Berry* (1876) 1 Q.B.D. 447.

[18] [1909] 2 K.B. 81 at p. 87.

[19] *R.* v. *Roberts* [1954] 2 Q.B. 329 at p. 331.

[20] (1950) 34 Cr.App.R. 87.

Broadmoor), it sometimes happens that the prosecution seeks to prove that although the prisoner might appear capable of understanding the proceedings, " his entire outlook was tainted by defective reason and therefore he was incapable of giving proper instructions for his defence or of challenging a juror and, accordingly, unfit to plead." [21] However, in cases of murder, the figures appear to indicate that juries have generally been ready to be convinced by medical evidence that the accused is unfit to plead, and it was the opinion of the Royal Commission on Capital Punishment in 1953 that " the criterion of unfitness to plead has been widened and the test is now much less stringent than it was fifty years ago or even more recently. The prison medical officers went so far as to say that 'unfitness to plead means insanity in the ordinary medical sense.' " One medical officer maintained that while the proposition that if a prisoner is certifiable as insane he is also unfit to plead was no more than a guiding principle, nevertheless, " while such a prisoner was not necessarily unfit to plead, he nearly always was so." [22] It seems likely that the restriction of capital punishment and the introduction of diminished responsibility will bring about a change in the attitude of juries and medical officers, and that the proportion of persons found unfit to plead to a charge of murder will probably decline to an extent which will not be wholly explained by a less frequent use of the defence. Whatever the theoretical definition of fitness may be, it may well vary in practice dependent on whether or not the offence charged is capitally punishable.

What procedure should be followed?

Generally, the procedure followed appears quite simple and straightforward, and no question is raised as to its correctness. Where the accused fails to plead to the indictment, it must first be decided whether he stands mute of malice (or obstinacy) or mute by visitation of God. If it is clear that he can plead and understand the proceedings, the judge enters a plea of not guilty on his behalf and the trial proceeds.[23] If there is any doubt, however, a jury consisting of any twelve persons present is empanelled and sworn to try this issue. If the jury finds him mute of malice, a plea of not guilty is entered for him; if it finds him mute by visitation, it may be resworn to try whether he is able to plead.

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[21] This statement is quoted from a recent letter from a solicitor engaged in proceedings involving charges of larceny and housebreaking, in which the prosecution sought to raise the issue of fitness to plead.

[22] See Cmd. 8932, para. 220.

[23] Criminal Lunatics Act, 1827, s. 2.

In *R.* v. *Steel* in 1787,[24] it was held that a finding that the prisoner was mute by visitation was not an absolute bar to her being tried on the indictment, and that a plea of not guilty should be entered for her. However, the decision has been criticised [25] and the better view is that the further issue of fitness should have been raised. In *Pritchard*, the jury was sworn three times, to determine the questions of muteness, fitness and insanity.[26] Generally, however, the latter two questions are read as one, and if this is affirmatively answered, the finding is recorded and the accused is ordered to be kept in strict custody until Her Majesty's pleasure be known.

Where the accused does not stand silent but pleads or wishes to plead to the indictment, the question of his fitness to plead may still be extremely relevant, and it is particularly in this type of case that the right to raise the issue of fitness is at all likely to be challenged. A recent decision of some general importance in this connection is *R.* v. *Vent.*[27] Vent pleaded guilty to murder and the trial judge asked counsel to interview him and explain his position to him. Counsel did so but failed to get any coherent statement from the accused and thereupon informed the judge that the question occurred to him whether the accused was fit to plead. The judge then said that he desired to hear evidence from the senior medical officer at Brixton, who was sworn and stated that he had no reason to depart from the view he had given in his report that the accused was fit to plead. He said he was satisfied that the accused was sufficiently sane to understand the nature of the charge and in a position to follow it, to know whether he wished to be represented or not, and to appreciate the nature of his plea and the consequences flowing from it. Counsel took no further part, the indictment was again put to the accused and again he pleaded guilty. It was held by the Court of Criminal Appeal that in such a case, it was only where there was some reason to doubt whether the accused appreciated the nature of his confession or the consequences that would flow from it, that a jury should be empanelled to try the issue of fitness. Where the accused pleads guilty, therefore, it is not any and every doubt as to his fitness that justifies the empanelling of a jury, but only some substantial reason for supposing him to be unfit to plead. Presumably, if the accused's demeanour in court raises doubts as to his sanity, the judge should be entitled to refuse to accept a plea of guilty at the outset, and to have the issue of fitness first heard by a jury. This argument, and indeed the decision in *Vent*, lends strong support to the view that it must be open to the judge to raise the issue of fitness to plead despite the objections of the accused, though it does not necessarily support the conclusion that the judge may do so in all cases where the accused objects. It does at the same time indicate the need for compulsory medical examination of any person accused of a serious offence even if, as Dr. Glanville Williams states, "the shortage of psychiatrists makes it impossible to provide for an expert examination of every accused person, even if such a course were desirable." [28] In *Vent*, a report had been prepared because the accused had been charged with a capital offence; generally, however, there is no preliminary safeguard against the danger of accepting a plea of guilty from a person unfit to plead.

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[24] 1 Leach 457.

[25] In *R.* v. *Berry* (1876) 1 Q.B.D. 447 at p. 449.

[26] It was found that he was fit to plead since he was able to read and write, having been taught in a deaf and dumb asylum, but he was found insane on evidence being given that he was nearly an idiot and had no proper understanding.

[27] (1935) 25 Cr.App.R. 55.

Another procedural point which has recently been settled lends further support to the decision in *Beynon*. In *R.* v. *Darkhu* [29] the jury failed to agree on the issue of fitness and the question arose whether a fresh jury should be sworn to return a verdict on this issue, or whether the court should proceed to try the charge. Finnemore J. accepted the Crown's contention that the issue is one on which a final determination must be made, and the jury was discharged and a new jury sworn. Although it is not clear from the report who raised the issue, the fact that once it is raised it must be settled, however unwilling the defence may be, certainly strengthens rather than weakens the argument of Byrne J. in *Beynon*.

Before considering the conflict between *Beynon* and *Roberts*, certain further points relating to the procedure in unfitness cases should be noted. Technically, unfitness to plead is not a permanent bar, and a person may be tried on recovering his sanity, though this is not often done unless it is later suspected the accused was shamming insanity. Moreover, as the Royal Commission on Capital Punishment stated: "Though trial after recovery is rare, if only because of the difficulty of bringing forward witnesses long after the crime, many witnesses (before the Commission) thought it morally and therapeutically undesirable that the accused should be liable to it and that some final determination of the case ought to be reached in the original proceedings." [30] Further, it was argued by the defence in *Beynon* that "if a person found unfit to plead at any time returns to sanity, he is liable to be tried, after a lapse possibly of years, after which defence witnesses may no longer be available; the Crown has the depositions of its witnesses."[31]

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[28] *Criminal Law, The General Part* (1953) at p. 303.
[29] [1956] 1 W.L.R. 989.
[30] Cmd. 8932, para. 222.

Surprisingly, perhaps, there is some doubt as to who bears the onus of proof. Halsbury,[32] for example, supports what appears to be the majority view that the onus is on the Crown to establish that the accused is fit to plead, and this may lend some slight support to the argument that only the defence may raise the issue of fitness. To place the onus of proving fitness on the Crown where it has itself raised the issue might mean that the accused could be found unfit to plead without any evidence of his unfitness being given and without there being any sign of his insanity. To be sure, the defence might challenge the issue but sometimes might be tempted to let it pass where there is a likelihood that the accused would otherwise be found guilty of some serious offence.[33] The sensible solution, it is submitted, would be to treat the onus as one of proving unfitness and to place it on whoever raises the issue. If, in the future, the judge is to be allowed to raise the issue, the onus of proving unfitness should be on the prosecution. There is, admittedly, little justification in the cases for this suggestion, though the presumption of sanity could be applied here as in the question of insanity at the time of the act, and it is significant that in the case which is usually cited as authority for the minority view that the onus is on the defence to establish unfitness, the issue of fitness was raised by the defence.[34] In any event, it seems from the scarcity of reported cases on this point, that the argument is more of a theoretical than a practical nature, and it has been held that the jury may form their judgment from the accused's demeanour in court and may find him to be insane without any evidence being given by either side.[35]

A final point that should be noted before coming to the conflict between *Beynon* and *Roberts*, is that the manner of determining fitness which has so far been discussed is relevant only in hearings of indictable offences. The detention procedure, authorised by the Criminal Lunatics Act, can only be employed where the accused is charged with an indictable offence and, in any event, the process of impanelling a jury might prove particularly difficult in cases where no jury had been summoned to try the main issue. However, the question of fitness to plead is, theoretically at least, as important in summary offences as in indictable offences, and some procedure is adopted to ensure that the trial is not that of an insane person, incapable of understanding the proceedings and of defending himself.[36]

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[31] [1957] 2 Q.B. 111 at p. 112; [1957] Crim.L.R. 472.

[32] Halsbury's *Laws of England* (3rd ed.), Vol. 10, at p. 403. This view has recently been somewhat endorsed by the direction of Salmon J. in *R.* v. *Sharp* [1958] 1 All E.R. 62, which states that it is for the prosecution to prove that the accused is mute of malice and that the jury "must be satisfied that that was the fact."

[33] It might be used to achieve a compromise which bears little relation to the true facts, analogous to that which is sometimes employed in the United States to secure a plea of guilty to second degree murder by an understanding that a charge of first degree murder will not be pressed by the prosecution.

[34] *R.* v. *Turton* (1854) 6 Cox C.C. 385.

[35] *R.* v. *Goode* (1837) 7 A. & E. 536.

Normally, the question of who may raise the issue of fitness does not cause any difficulty. In the past, the right to do so has almost certainly been exercised by the judge or the prosecution, as well as by the defence, and no objection has been taken on behalf of the accused, either because there is little doubt that he would otherwise be found guilty or because there is a prima facie case and his counsel is of belief that it is in his client's interests that the issue be raised, the accused being too insane to object. It sometimes happens that the accused would clearly be found guilty, is incapable of fully understanding the proceedings, and yet is sane enough to prefer the prospect of a short prison sentence to the risk of indefinite detention in Broadmoor. In this case, it is at least arguable that he should not be able to exercise the option and that the judge should have the right of raising the issue of fitness. *A fortiori*, this is true where he pleads guilty but is too insane to appreciate the consequences of his plea. But where his counsel doubts whether he would be found guilty, it can hardly be just to commit him to Broadmoor under the Criminal Lunatics Act, not because he is a criminal lunatic, but because he is a lunatic, and it is irrelevant whether he would have been found guilty had he stood his trial. By permitting the judge or prosecution to raise the issue of fitness, the law may sanction the detention of an innocent man as a criminal lunatic, and it was this proposition that Devlin J. refused to accept in *R.* v. Roberts. "Indeed," he said, "it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or not—and investigations which might have led to the apprehension of the true criminal would not take place."[37] This argument is difficult to refute, and so convinced was Devlin J. of its force that he said that even had there been no procedure available, he would have deemed it necessary to invent one to allow trial of the main issue before that of fitness where counsel for the accused wished to challenge that the prosecution could prove its case. In his opinion, counsel could not be forced to elect either "to play for safety" or to gamble on the chance of getting his client off altogether. It should be noted that this decision of Devlin J. is not inconsistent in principle with his later judgment in *Kemp*, allowing the judge or prosecution to raise the analogous issue of insanity at the time of the act, since they can only do this after the defence has led evidence of insanity and generally is not challenging the fact that the prosecution would otherwise be able to prove its case.

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[36] See further Stone's *Justice's Manual* (89th ed.), Vol. 1, pp. 239–240. Note, too, Magistrates' Courts Act, 1952, s. 26.

[37] [1954] 2 Q.B. 329 at p. 333.

In *R.* v. *Beynon,* however, Byrne J. felt compelled to reach a contrary conclusion. Certainly the authority he cites is far more convincing than the one case on which Devlin J. in fact relied, and which was far from conclusive of the point in question.[38] The Criminal Lunatics Act, to which Devlin J. did not refer, is not, admittedly, expressed in mandatory terms but certainly does not appear to suggest that the issue of fitness can be postponed. Moreover, the idea of detaining as a criminal lunatic someone against whom the prosecution may have no case, did not worry the draftsmen of the statute, which further provides, as Byrne J. pertinently pointed out, that if any person shall be brought before any court to be discharged for want of prosecution and such person shall appear to be insane, it shall be lawful to empanel a jury to try the issue and if he is found insane, to order him to be kept in strict custody. It seems incredible that such a procedure should be lawful, yet the section is quite unambiguous. Moreover, the cases certainly seem to support the conclusion in *Beynon*. In *R.* v. *Dashwood*, for example, Humphreys J. stated that "It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself," and that the court would be bound to raise the issue "on information conveyed to it from any quarter." To allow the accused to postpone raising the issue until the main question was disposed of would be "a most dangerous precedent to create," for "we should be encouraging every person charged with any serious crime before a jury to instruct his counsel to conduct such defence as he thinks right before the jury and, if that fails, to come to this court and ask that the state of mind of the accused person should be inquired into. We decline to accede to that course."[39] It should, however, be noted that even if one accepts the view of Devlin J., it does not follow that the accused can postpone raising the issue of fitness until the case is heard by the Court of Criminal Appeal. If he fails to raise the issue in the trial court, he may have waived his right to raise it.

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[38] *R.* v. *Berry* (1876) 1 Q.B.D. 447.

[39] [1943] K.B. 1 at pp. 4, 5.

The conflict between the two decisions is an interesting one, and the point in issue is not unimportant, however infrequently it may arise in practice. It seems likely that *Beynon* will be followed in the future because it is administratively convenient, and because the precedents on which it relies provide strong authority for its conclusion. However, to the present writer at least, the policy argument of Devlin J. seems wholly convincing and is strongly reinforced by the fact that there can be no appeal against the verdict of a jury as to whether the accused is of sound mind.[40] The decision in *Roberts* may entail a certain amount of inconvenience for the prosecution, and doubtless is not meant to apply where the accused pleads guilty yet is at least questionably insane. However, the danger of sending an innocent man to Broadmoor should not be ignored: there may be cases where the issue of fitness should not be heard until the main issue has been tried and concluded in favour of the Crown. Whether this should be so in all cases where the accused pleads not guilty is difficult to say. But it should be possible in practice for counsel to postpone any hearing of the issue of fitness where he is reasonably convinced that his client would be found not guilty of the offence charged.[41]

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[40] *R.* v. *Jefferson* (1908) 1 Cr.App.R. 95.

[41] It should be reassuring for those who are convinced by the force of Devlin J.'s argument that the Royal Commission on Capital Punishment took a somewhat similar view: "We found no evidence to suggest that innocent persons who would have been acquitted by a jury are in practice likely to be found insane on arraignment; the facts are usually clear and beyond dispute. But although the risk may in practice be small, it must always exist, and is increased if the test of unfitness to plead is widened to cover those whose insanity is not gross and patent. We agree with the view expressed by the majority of our witnesses. We think that cases of indefinite detention as a Broadmoor patient without trial ought to be kept to the minimum, and we do not favour freer recourse to the practice of raising the issue of insanity on arraignment."

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S. Prevezer
1958

The Interpretation of Statutory Powers of Arrest Without Warrant

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

(*continued from p.* 84, *ante*)

To whom the power of arrest is given

Statutes sometimes give powers of arrest to any person, sometimes to constables, sometimes to other special classes. Where the power is given to a constable, it is not clear whether he must be on duty and in uniform in order to exercise it, but apparently not. The Municipal Corporations Act, 1882, s. 193, is expressly confined to constables on duty; and the Road Traffic Act, 1930, s. 20 (3), is expressly confined to constables in uniform.

The arrest of secondary parties

Some statutes (such as the Railway Regulation Act, 1840, s. 16), expressly authorise the arrest not only of the principal offender but of those counselling, aiding and abetting him (secondary parties). It seems, however, that secondary parties could be arrested without express mention in the statute; for the secondary party is generally deemed in law to commit the principal offence.[17]

The interpretation of the word "found"

The Metropolitan Police Act, 1839, s. 54, and the Town Police Clauses Act, 1847, s. 28, empower a constable to arrest for certain offences committed "within his view." The meaning of this expression is reasonably clear, and Bankes L.J. expressed it by saying that the phrase "limits him to things which occur before his own eyes and prevents him from acting merely on information which he has received from other persons."[18] Yet questions may still arise whether a constable is entitled to arrest when he sees only part of the offence, the act constituting the other part having been reported to him.

A much commoner word in legislation is "found." Several statutes authorise the arrest without warrant of persons "found" in certain situations, or make it a special offence to be so "found."

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[17] *Mackalley* (1611) 9 Co.Rep. 61b; *Turner* (1830) 1 Lewin 177; *Gould* v. *Houghton* [1921] 1 K.B. 509; *Ackroyds, etc., Ltd.* v. *D. P. P.* [1950] 1 All E.R. 933; Accessories and Abettors Act, 1861, s. 2.

[18] *Isaacs* v. *Keech* [1925] 2 K.B. at 361.

Thus there are certain powers of arresting those found committing certain offences under the Vagrancy Act, 1824, s. 4, the Larceny Acts, 1861 and 1916, and the Malicious Damage Act, 1861 ; and there is power under some statutes to arrest persons who shall be found committing indictable offences in the night. In contexts like these the word " found," like the phrase " within his view," has the effect of prohibiting arrest upon hearsay information. If, when the officer arrives on the scene, the offence has been committed, however recently, he has no power to arrest on his own account (*per* Maule J. in *Simmons* v. *Millinger* (1846) 2 C.B. 524 ; *cf. Field* v. *Musgrove* (1867) 16 L.T. 536). However, it is sometimes possible to adopt a procedure that will mend matters. Where a private person is empowered to arrest those whom he finds committing an offence, a bystander may be willing to make the technical arrest while the constable, who has arrived on the scene afterwards, " assists " him. This will be considered later.

A person " finds " an offence being committed whenever he is a witness of it: thus a constable may " find " a man committing an assault upon the constable himself.[19] Where a constable properly tests a person by asking him to sell liquor illegally, and the person complies by selling to the constable, the constable " finds " the offence committed.[20] It seems probable that the evidence may be supplied through any of the five senses. Byles J. in one case explained the words " found on him " in a statute as meaning " heard, seen or felt on him " [21] ; Brett J. in the same case regarded it as sufficient if the fact is " so brought to his senses that a reasonable man would fairly conclude " it was there. (See the report in 38 L.J.M.C. at 122 ; the *Law Reports* version says: " if the circumstances were such as to produce certainty in his mind.")

Although there is a dearth of English authority, it may seem logical to hold that the converse proposition is also true, that an officer does not find a crime committed if he does not perceive it, notwithstanding that he is physically present at the time. The American authorities declare that in such circumstances the officer is not " present " in contemplation of law. It is even held in the United States that if a man is carrying contraband in a bag, and the officer, having a " hunch " that the bag contains contraband, arrests him, the arrest cannot be justified as for an offence committed in the officer's presence, because the officer did not perceive the contraband through any of his senses before the arrest. This view seems unduly narrow, because the officer did, after all, perceive the behaviour which he regarded as suspicious, and drew the right inference from it. In any case the American courts modify their rule by holding that admissions made by the culprit may be taken into account. Suppose, in the case just put of a man who is secretly carrying contraband, that the officer stops him and demands to know what is in the bag. Then, if the man makes an admission from which the officer reasonably concludes that he is carrying contraband, the crime is held to be committed in the officer's presence.[22]

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[19] *Dunham* [1950] 1 D.L.R. 498 ; 24 M.P.R. 330 ; 95 C.C.C. 317 ; 9 C.R. 167 (N.B.C.A.).

[20] *Hills* [1924] 1 W.W.R. 651 ; 44 C.C.C. 329 ; 20 Alta L.R. 156.

[21] *Clarke* v. *Crowder* (1869) L.R. 4 C.P. at 643.

Section 6 of the Vagrancy Act, 1824, empowers the arrest of persons " found offending " against the Act. It was held in *Horley* v. *Rogers*[23] that this could not extend to the offence of wilful neglect to support a wife under section 3, because a person could not be " found offending " unless the offence is " apparent and in the course of perpetration by the offender, before the eyes of the constable." In argument Cockburn C.J. said: " The offence charged was not one obvious to the eye and senses of the constable." The decision is still of general interest, though this particular offence under section 3 has since been repealed.

To a certain extent, at least, common-sense inference is allowed to aid the evidence of the senses. For instance, suppose that the offender is seen to pull the trigger of a revolver; there is a report, and the victim falls with a bullet wound. Obviously the onlooker " finds " the offence being committed, notwithstanding that he does not see the bullet travel through the air. Similarly, if a master sees his servant putting money into his own pocket instead of the till, the servant is " found " committing embezzlement, though part of the offence—as almost always in serious crimes—lies in his invisible mind.[24] Canadian courts hold that a man may be " found " keeping a bawdy house[25]; and, after some differences of opinion, it now seems to be accepted there that a man may be " found " keeping a common gaming house.[26] The question of false inference, resulting in an arrest on mistaken belief, was discussed previously.

The American doctrine is that an offence is committed in the officer's presence if he sees one of a series of continuous acts which constitute the offence,[27] or if he sees part of the offence and is aided as to the rest by information.[28]

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[22] *State* v. *Gulczynski* (1922) 120 Atl. 88.

[23] (1860) 2 E. & E. 674.

[24] *Cf. per* Lush J. in *Field* v. *Musgrove* (1867) 16 L.T. 536.

[25] *Whitworth* v. *Dunlop* [1934] 3 D.L.R. 727; 1 W.W.R. 604; 62 C.C.C. 41; 48 B.C.R. 161.

[26] *Selock* [1931] 2 W.W.R. 747; 56 C.C.C. 243; 25 Alta.L.R. 504; *Whitworth* v. *Dunlop*, above.

American courts further hold that a crime is not committed in the officer's presence if, although he finds the evidence of it, the offender is not there. Thus if the officer finds illegal whisky in a man's car, or a still in full operation in his house, the crime is not committed in the officer's presence if the offender himself is absent.[29] The rationale of this is that if the offender is absent, the proper course is to procure a warrant. It is conceived, however, that if the officer were to wait for the return of the offender, and if the offence is in its nature a continuing one, the officer could on the man's return arrest him as for an offence committed in his presence.

A statutory power of arresting a person found committing a given crime is not construed as allowing arrest for attempted crime. Formerly, some judges added the opinion that the arrest must not be after the offence is completed.[30] Even though the officer finds the party committing the offence, he can only arrest while it is actually in course of commission. This view, however, leads to an absurd result. Many crimes—all those that are not of a continuing nature—are over and done with in a moment. When the criminal act itself takes only a second, it is absurd to say that there can be no arrest before the act (because then it is only an attempt), and no arrest after the act (because then the crime is over). Accordingly, the modern view is that, provided the offender is caught in the act, he may be arrested subsequently. Reference has already been made[31] to a New Brunswick case which allows a constable to arrest a man who committs an assault upon the constable himself, as for an offence that is "found." However, it may be held that arrest in such a case must be shortly after the act; and some statutes expressly require the arrest to be made "immediately." To these we now turn.

The interpretation of the word "immediately"

The expression "found committing" appears in the Larceny Act, 1861, s. 103, and the Larceny Act, 1916, s. 41 (1), and these provisions also require the apprehension to be "immediate." The restriction is not important in respect of the felony of larceny, for here the arrest is valid on common law principles even though it is not immediate. But for statutory stealings not amounting to felonious larceny (such as taking growing vegetables and plants) the only power of arrest is that given by the statutes; and so also with the crimes of fraudulent conversion and obtaining by false pretences, which are only misdemeanours.

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[27] *State* v. *Lutz* (1919) 85 W.Va. 330 at 344; 101 S.E. 434 at 439.

[28] *State ex rel. Verdis* v. *Fidelity, etc., Co.* (1938) 199 S.E. 884.

[29] *Temperani* v. *U.S.* (1924) 299 Fed. 365; *Bell* v. *U.S.* (1925) 9 F. 2d 820.

[30] See, *e.g.*, *Mathews* v. *Biddulph* (1841) 3 M. & G. at 395.

[31] Note 19, *ante*.

At first the interpretation given by the judges to the words "found" and "immediate" was a strict one. In *Curran*[32] it was ruled that a man is not "found committing" an offence of taking turnips if when found he is in the next field with the turnips in his possession. (The turnips, having been dug by the thief from the field, were not the subject of larceny at common law, and the taking was only a statutory misdemeanour, sometimes called a "quasi-larceny"; if they had been taken from a store it would have been a felonious larceny at common law, because then they would be chattels, and the power of arrest would have been wider.) A similar conclusion was reached in *Phelps*,[33] where the accused was found with potatoes under his shirt. These determinations must now be taken to be wrong. In *Griffith* v. *Taylor*[34] it was laid down by the Court of Appeal that "if a stolen chattel is carried over a considerable space by the thief, the asportavit continues so long as that removal continues, and the taking, in point of law, continues too."[35] The court accordingly held that if the thief is found with the stolen chattel in his possession, and then apprehended, he is "found committing" the offence within the meaning of the statute, and the arrest is "immediate," even though separated from the first taking by a considerable space of time. It is only when the thief abandons or otherwise loses possession of the thing that time begins to run in his favour from the point of view of the statutory power of arrest.

The fiction of continuous taking is confined to larceny and the statutory quasi-larcenies,[36] and does not extend to the crime of obtaining by false pretences. The latter crime is completed on the obtaining, which takes place at a single point of time and is not deemed to be continuous with the accused's possession of the property. The accused must therefore be "found" at the moment of the obtaining, and the arrest must be made (having regard to the express requirement in the statute) immediately thereon; it is not sufficient that it is made immediately after the offence is discovered. Thus a lapse of only two hours before the offence is discovered invalidates an arrest.[37]

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[32] (1828) 3 C. & P. 397.

[33] (1841) C. & M. 180.

[34] (1876) 2 C.P.D. 194.

[35] *Cf.* Hale, P. C., i, 507–508.

[36] *Cf.* as to the latter *Sherriff* (1903) 20 Cox 334.

If the offender is found in the act, " fresh " or " hot " pursuit is allowed ; and a capture effected at the end of the trail will be deemed an immediate one in law although the chase is prolonged. The law of fresh pursuit goes back to the Middle Ages, but it has become of greater practical application with the greater mobility of criminals and police. The rules are that the fresh pursuit must be started on the commission of the offence,[38] and that it must be continuously pressed. Whether pursuit is fresh is a question for the jury, if there is one. This was all that was actually decided in *Griffith* v. *Taylor* (above). The facts were that A, a passenger by rail, found B in possession of his box of eggs in suspicious circumstances ; A notified the railway staff and the box was taken from B at Reading ; B remained on the train, which left non-stop for London, so A telegraphed ahead to the police in London to arrest B when he should arrive. B was arrested accordingly. In an action by B against A for false imprisonment, the question arose incidentally on a procedural point, under a statutory provision now repealed, whether A's conduct was justified under section 103 of the Larceny Act, 1861, or (at least) whether he could honestly have thought that it was. The Court of Appeal, while agreeing that the word " immediately " in the section ought to be liberally interpreted, and that hot pursuit was allowed, held that the question whether the pursuit was hot should have been left to the jury, and the court seems for its own part to incline against the view that the pursuit in the particular case was hot. The court did not rule as a matter of law that pursuit by means of the electric telegraph was inadmissible. At the present day, when a chase by different police cars acting in wireless communication is of common occurrence, there would seem to be no longer any reason to doubt that a hot pursuit may be conducted by telecommunication.

Arrest effected by one who did not himself " find " the offence

The illustration of the police cars does, however, raise a problem of a more serious character: where a statutory power of arrest is conferred upon one who finds an offence committed, may he act through an agent or fellow-officer who did not himself participate in the finding?

Some statutes which confine the power of arrest to a specific person, such as a constable, expressly include in the same protection all those whom he may summon to his assistance. There can be no doubt that the same provision will be implied into those statutes in which it is not expressly stated, for it is a general principle of the common law that those who aid a constable upon his summons receive the same protection as the constable himself.[39] Similarly, if a power of arrest is conferred upon anyone who finds an offence committed, and if a citizen finds the offence being committed, he may summon to his aid a constable who comes up afterwards, and an arrest effected by the constable in the presence of the citizen will be within the statutory protection.

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[37] *Downing* v. *Capel* (1867) L.R. 2 C.P. 461.

[38] *Downing* v. *Capel,* above.

The difficult question is whether the same rule extends to an arrest effected by the agent out of the presence of the principal. To put this in another way, may a fresh pursuit be taken up by a chain of pursuers? Where the arrest is at common law on suspicion of felony, fresh pursuit is certainly allowed; but where the arrest is under a statute its validity may depend primarily on the words of the statute. For example, the Malicious Damage Act, 1861, s. 57, gives a constable power to arrest "any person whom *he* shall find lying or loitering," etc. Here the arrest must apparently be effected by the constable who originally discovers the offence. On the other hand, section 61 of the same Act puts the power into the passive voice: "Any person found committing any offence against this Act may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him." This does not expressly say that the person who finds the offence being committed must be a peace officer, etc., or the same person as the one who effects the arrest. Moreover, the section fairly implies that the person finding the offence may be the owner of the property, while the arrest may be effected by his servant under his direction; and the section does not say that when the servant effects the arrest the owner must be present.

A case under the section (or rather its predecessor in an earlier Act) is *Hanway* v. *Boultbee*.[40] The facts were that a woman, who witnessed an alleged offence to her dog, sent a boy to fetch a constable; the constable came immediately and the woman then directed him to pursue the alleged offender, who was overtaken about a mile away. Tindal C.J. ruled that although the statute did not allow "a stale apprehension on an old charge," the words should not be taken so strictly as to defeat its reasonable operation; no greater diligence could be required than had been shown in the present case, and it was therefore an "immediate" apprehension.

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[39] Hale, P. C., ii, 86.

[40] (1830) 1 M. & Rob. 15.

No objection was taken to the fact that the arrest by the constable was out of the presence of the woman, who alone witnessed the alleged offence. Nor was any objection taken on a similar point in *Griffith* v. *Taylor*.[41]

With much stronger reason is such an arrest valid where the statute does not require it to be made " immediately." An illustration is *Stevenson* v. *Aubrook*,[42] decided under the Vagrancy Act, 1824, s. 6, which empowers " any person whatsoever to apprehend any person who shall be found offending against this Act." A lady noticed a man making movements of an indecent character, and reported him (through the agency of a friend) for indecent exposure; the police went out in a car, overtook the man, and arrested him for the offence of indecent exposure under the Vagrancy Act. It then transpired that he had not exposed himself, though he had indecently fumbled with his trousers. Hallett J. was prepared to rule that, if the man had been guilty of the offence, the arrest by the police on pursuit would have been lawful, even though the police had not themselves " found " the offence; for the police were acting on the complaint of the person who had found the offence. However, he held the arrest unlawful because the offence had not actually been committed; the reasonable belief on the part of the police was not a defence under the particular statute.[43]

It may be noticed that the police would still have been in trouble on the facts of the case, even if reasonable suspicion had been recognised as a defence. The lady who called in the police did not have a reasonable suspicion of the offence, because she knew that there had been no exposure, although she told the police that there was. This lady could not herself have made a valid arrest, nor could she justify making an arrest through the long arm of the police. Thus, it would seem to follow that the police could not justify their conduct as acting in her aid, for there is no lawful authority to aid in an illegal arrest. Nor, of course, could the police justify on their own account, because they did not " find " the offence committed, or even find it appearing to be committed.

One may surmise that the legislature has two reasons in mind on the occasions when it confines a power of arrest to suspects " found " in the act. First, if the officer has perceived the crime with his own senses, there is generally less risk of a mistaken arrest; circumstantial and hearsay evidence are ruled out. Secondly, if the culprit is not found committing the offence, if it is all over when the officer arrives on the scene, there is no reason why a warrant should not be obtained. Neither of these reasons is completely persuasive. A person apparently found committing an offence may in fact be guiltless, perhaps because he lacks the requisite intent; or, on the other hand, there may be cogent evidence pointing to his guilt although he is not caught red-handed. Moreover hearsay evidence is not effectively ruled out if Hallett J.'s view is correct and the police may arrest for an offence that they have not " found " on complaint by one who has " found " it. As for the second reason, whether it is possible to get a warrant depends on whether the culprit's address is known, and if so whether he is likely to abscond before the warrant is issued. The latter question, in turn, depends in some degree on the gravity of the crime; not merely its gravity in legal abstraction but its gravity in all the circumstances. These considerations, and the various difficulties in the law that have been discussed in these pages, suggest a doubt as to the policy of limiting the power of arrest by words like " found " or " in his view." The important question for Parliament to consider in giving a power of summary arrest is whether the offender is likely to escape if not immediately arrested, and the question whether the offence was committed in the view or vicinity of the arrestor is of no relevance to this.

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[41] Note 34, *ante*.
[42] [1941] 2 All E.R. 476.
[43] p. 79, *ante*.

The reader who has had the patience to read this article to the end will be sufficiently convinced of the extraordinary traps which Parliament has designed for the police and others who try to promote the ends of criminal justice.

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Glanville Williams
1958

The Montesi Case *

By C. D. L. CLARK, B.A.

In the early morning of April 11, 1953, the dead body of a young woman, named Wilma Montesi, was found on the lonely beach of Tor Vaianica about twenty miles from Rome. Her death set the opening scene for a melodrama which was to be acted out before the eyes of the world. In [1955] Crim.L.R. 359 Professor Battaglini sketched out the course of events which led to the *sentenza di rinvio a guidizio*, the " sentence of sending to judgment," submitted to the Public Prosecutor by Raffaelo Sepe. In this Sepe demanded the committal for trial of Piero Piccioni for the " culpable homicide " of Wilma Montesi, and of Saverio Polito and Ugo Montagna as accessories after the fact; in addition, a number of people who had given allegedly false evidence were committed for perjury. The trial was held in Venice early in 1957 before Judge Tiberi and two assistant judges: there was no jury.

Professor Battaglini summarised the main arguments of the *sentenza* under seven heads. In order to bring readers up to date, this summary is now restated and commented on in the light of the Venice trial.

> (a) The thesis that Montesi went to Ostia on the afternoon of April 9 to bathe her sore feet was inconsistent with the fact because the girl did not suffer from any skin irritation. This story was a fiction of the victim's friends and was welcomed by the police in order to reach rapid conclusions about the inquiry, without further investigations of the cause of death. On the contrary, Montesi died on the night of April 10–11 at Tor Vaianica, very near the place where her body was found. She was, in fact, seen with a young man, who must be identified as Piccioni, shortly before her death.

It is clear that the foot bathing story was untrue: it appears, indeed, to have been suggested to the Montesi family by Rosa Passarelli, a civil servant with a high imagination who claimed to have travelled to Ostia in the same compartment as Wilma Montesi. However, there is no conclusive evidence that Montesi was seen with a young man on the night of April 10–11, and she was certainly not with Piccioni, since his alibi for the period April 9 to April 13 was unshaken at the trial. See (e), *infra.*

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* Incorporating reviews of *The Montesi Scandal* by Wayland Young, published by Faber & Faber, Ltd., at 18s. net, and *All Rome Trembled* by Melton S. Davis, published by Barrie Books, Ltd., at 12s. 6d. net.

> (b) There was no evidence to suggest that Montesi led a double life and was implicated in dubious transactions. All the circumstances led to the supposition that the girl had some relations with a person with whom she went away on the afternoon of April 9, who must be identified as Piccioni, with whom Montesi had been seen previously. The two of them had, in fact, been observed together a month before by a mechanic Piccinini in a car which had sunk in the sand on the coast of Ostia.

Again, the movements of Wilma Montesi on the afternoon of April 9 are obscure. Piccioni was certainly not with her (see (e), *infra*). As to the mechanic Piccinini, his evidence was controverted by a railwayman called Alfonso di Francesco who had helped to get the car out of the sand. Piccioni is dark and Italian, Montesi was also dark and Italian. Di Francesco said that the young man was fair and spoke with a strong foreign accent, that the girl was also fair and spoke no Italian and, indeed, that the couple conversed in French.

> (c) Cogent evidence against the accused was furnished by the conversation which Piccioni and Montagna had on the evening of April 29, 1953, with Pavone, the Chief of Police, even before the press openly accused Piccioni of complicity in the Montesi affair. This matter, which threw suspicion on the time of the meeting and the denial of the accused men, was first revealed by Caglio and later confirmed by the declarations of the Jesuit Father Dall' Olio and an official of the office of the Minister Attilio Piccioni.

This important piece of evidence was exploded by the secretary of the film star Alida Valli, who testified that Piccioni was present at a dinner party with herself, Alida Valli and others on the evening of April 9. Dall' Olio tried to confirm Caglio's account of the supposed meeting by contacting the official who seems to have been one Rainesi Dolci. But Dolci never actually saw Piccioni and Montagna, and Dall' Olio, in examination at the Venice trial, was evasive. Moreover, so much of Caglio's evidence was impugned at the Venice trial as to cast grave doubt on this part of her testimony as well.

> (d) In order to mislead the police inquiries, an attempt was made to implicate Prince Maurizio d'Assia in the affair; the latter was indicated as the man who, on April 10, drove over the land holding of Capocotta in a car with a dark-haired girl who might be identified as Montesi.

A gate-keeper at Capocotta called Lilli, testified that the Prince's car was at Capocotta on April 10. Lilli was committed by Sepe for perjury, but acquitted at the trial. However, his evidence conflicted with that of others on the Capocotta estate, and the most that can be said is that the Prince *was* there on April 10 with a girl, but that she was not Wilma Montesi.

> (e) Piccioni's alibi was a fiction. The accused maintained that from the afternoon of April 9 to April 13 he was sick in bed suffering from a tonsillary abscess; he called in evidence numerous doctors and exhibited various prescriptions which had been made out for him. In the submission of the public prosecutor the witnesses had made conflicting declarations and the date of one of the prescriptions had been altered.

Piccioni's alibi at the Venice trial was cast-iron. On the morning of April 9 he left Amalfi with Alida Valli and went with her to Sorrento. He left Sorrento at half past ten and reached Rome at half past two: he had some lunch and lay down because he was in pain. His family told him to see a specialist. Dr. Zingale made an appointment for that same afternoon, and Piccioni was at the surgery of Professor Filipo at about 6 o'clock. From then on the alibi held up. But the question arose whether a prescription given to Piccioni by Filipo was false. Sepe claimed that the date had been altered from 7.1.53 to 9.4.53. However, like that of most doctors, Filipo's handwriting was quite illegible and prescriptions produced by Dr. Ognibene, a patient of Filipo's, supported Filipo's contention that the prescription was true: finally, a new secretary who was working for Filipo remembered Piccioni's visit because she was impressed by his being the Foreign Minister's son.

> (f) The responsibility of the ex-superintendent Polito, who on several occasions vouched for the accidental death of Montesi as due to a "medicated footbath" arose, according to the requisition from a long and precise succession of circumstances from which it was proved that Polito contributed in setting the inquiries on a false track and refraining from any investigation of Piccioni.
>
> Montagna was said to have helped Piccioni to elude the investigations of the police, in agreement with Polito, with whom he maintained contact even during the course of the inquiry of the Investigating Division.

There seems to be no doubt that Polito was negligent in reporting to his chief, Pavone, that Montesi died while bathing her heel at Ostia. The story could not have borne proper investigation. There was nothing wrong with her heel. The winds and tides could not possibly have carried her body from Ostia to Tor

Vaianica. The sand found on her body matched the sand only of Tor Vaianica, not of Ostia; her body had a distinctly fresh appearance, and the clothing did not contain the amount of salt which it should have contained if it had drifted down from Ostia. Whether, however, Polito was more than merely careless is open to doubt. Montagna may well have maintained contact with Polito; he was indeed here, there and everywhere in official circles, a veritable Eminence Grise *manqué*.

> (g) It was established that Montesi died owing to a criminal act. It must be assumed on the basis of the evidence that she was abandoned in a state of unconsciousness; the use of toxic substances could not be excluded from the medical examinations; she was already thought to be dead and abandoned on the extreme border of the seashore where she died by drowning.

This seems all too likely. Mr. Davis says: "Death had come slowly, taking from ten to twenty minutes, while normally asphyxiation from drowning usually took place in three to four minutes. This, and presence in the lungs of plankton and sand, as well as hyperaemia (congestion of blood), show that the girl was already exhausted and very likely unconscious before immersion."

In the event, Pierro Piccioni was acquitted because he did not commit the crime with which he was charged and Polito and Montagna were acquitted of the crime of being accessories after the fact, since the crime to which they were supposed to be accessories did not exist. However, Montesi does seem to have died, as the *sentenza* suggested, owing to someone's criminal act. The end of the trial was dominated by Giuseppe Montesi, Uncle Joe, Wilma's uncle, on whom suspicion later fell—and presumably still lies—for a fourth investigation is now in process.

For the lawyer, two features of the affair are of especial interest: the structure of the Italian police system and the processes of the Italian criminal trial. There are three police forces in Italy: the City Guard who conduct traffic with bravura and white gloves; the Carabineers, the traditional civil police who are responsible to the Minister of Justice; and the Public Security police whose work lies largely in the city; they are the vice squads, the riot breakers and the criminal investigators, Runyon's "Broadway Gendarmes," controlled by the Minister of the Interior. The functions of the Carabineers and the Security police are not mutually exclusive and there is considerable rivalry, a point spotlit early during the Montesi investigations, when a sensational report was turned in by Colonel Pompei of the Carabineers in the preliminary stages. On March 10, 1954, this report was read at the trial of a journalist, Muto; it made damaging allegations against

Montagna which spread their shadow over Pavone, the chief of the Security police. On March 13, Pavone resigned. Oddly enough, the report seems to have been ordered by Fanfari, the Minister of the Interior, an apparent anomaly which Mr. Young does not explain.

In the debate in the House of Commons, on the Report of the Bank Rate Leak Tribunal, Mr. Paget (Northampton, Lab.) is reported as saying that the tribunal procedure was an infamous one. A departure from the rule of law into an inquisitional proceeding always did harm. This is perhaps a not uncommon Anglo-Saxon platitude. But legal proceedings inevitably do, and any way should, reflect the characteristics of the society for which they are designed. That Italians are not Englishmen may be a blinding glimpse of the obvious, but the obvious should be looked at. There are two features of the Italian criminal trial at which we look insularly askance, the wide admissibility of evidence and the *confronto.*

The general rule of evidence in England is that " nothing may be given in evidence which does not directly tend to the proof or disproof of the matter in issue " (Archbold). The strictness with which the rule is capable of being applied is well illustrated by the recent majority decision of the Court of Appeal in the civil case of *Corke* v. *Corke and Cook* [1958] 2 W.L.R. 110, the upshot of which was to deny to a wife accused of adultery confirmation of her testimony that she had immediately been willing to submit to independent examination. Such a situation, to judge from the Venice trial, could not arise in Italian criminal proceedings. Witnesses at Venice frequently gave evidence of statements made by them on other occasions to support their testimony at the trial. On the other hand, much time was wasted in hearing evidence which could not possibly have been relevant to the issue of the trial, for example, that of the wizard Del Duca (see *infra*).

Perhaps the most exotic feature of the Italian trial to our pin-stripe eyes is the *confronto*. Where two witnesses, unshaken by counsel, Public Prosecutor, or judge, give conflicting evidence, there is no mere folding of the hands, but the pair are set face to face to hammer it out. Counsel may request a confrontation, and it is for the judge and his assistant judges to decide whether to have one. Witnesses cannot ask for a confrontation, as Caglio found to her cost. At Venice, Montesi was set against Montesi, but fortunately perhaps for their collective *gravitas,* a request for a confrontation between Pavone and Pompei (by that time a General) was refused.

These two books are required reading for anybody interested in the Italian character, Italian institutions and in particular in Italian law. Mr. Young's book is the more stylish and more readable product, but one cannot afford to ignore *All Rome Trembled*, because it contains matter which conflicts with Mr. Young's account at odd points and is slanted from a different angle. The whole affair resembles a film script by S. J. Perelman and Raymond Chandler. It has the high fantasy of the former and the tortuosity of the latter. Did Wilma Montesi wear two coats of lipstick to repel her fiancé? Who was Red Jenny? Did the wizard Del Duca really write a book saying that in 1950 Hitler was still living at the North Pole wearing a beard because his attendants refused to shave him? Del Duca's evidence indeed has a surrealist quality worthy of Salvator Dali—" Strange individuals were swarming about the neighbourhood of Via Capitanata where I lived. People would come from the country carrying chickens with their feet tied together and baskets of home-made bread and were spying on me day and night. . . . One day the lady in black came to me, all flashing with jewels and with bracelets on her wrists, necklaces round her neck and diamonds on her fingers. . . . She said she was called Mina and wanted to know if her husband was going to leave his mistress and come home. I understood at once that she had been sent to lay a trap for me, and I treated her as she deserved. I went straight out and told the police."

It is difficult to keep in mind that a girl died in suspicious circumstances and that nobody, after three investigations and the Venice trial, yet knows who, if anyone, was responsible for her death, but the light which the Montesi affair incidentally sheds on post-war Italy is strong and revealing. Both these accounts should be read, for they are complementary. Italy has not changed very much from Cicero's day in these matters. Substitute Cicero for Carnelutti, the principal defence counsel, and you are back in the side streets and the gang warfare of the close of the Republic. It is, perhaps, no accident that the best biography of Cicero was written by a Chicago underworld journalist. *O tempora, o mores!*

Previous Inconsistent Statement

By Eric Stockdale, LL.M., B.SC.(Econ), *Barrister-at-Law*

The appeal of *R.* v. *Richard Charles Hart*,[1] which was heard on December 18, 1957, by the Court of Criminal Appeal (Lord Goddard C.J., Devlin and Pearson JJ.) raised an interesting question under the Criminal Procedure Act, 1865—a statute which is misnamed, as Devlin J., in delivering the judgment of the court, pointed out, for section 1 provides that most of it shall apply to civil as well as criminal courts.

The appellant had been convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm contrary to section 18 of the Offences against the Person Act, 1861, and sentenced by the Common Serjeant (Sir Anthony Hawke) to five years' imprisonment. At the trial the defence had unsuccessfully striven to obtain a conviction of the lesser offence of unlawful wounding, contrary to section 20 of the Act—unlawful wounding without the specific intent required by section 18. In order to persuade the jury that the accused had no intent to cause grievous bodily harm to the victim of the assault, the defence tried to show that the victim had brandished a bottle at the accused, who had then picked up the knife which had caused the wound, immediately before the stabbing.

The prosecution dealt with this line of defence in advance by tendering proof that the victim had at no material time had a bottle in his hand. One of the prosecution witnesses who gave evidence to that effect was a man called Cunliffe, who was the owner of the house at which the stabbing had taken place. He was cross-examined by defending counsel who put it to him that he had some days after the date of the offence said to a man called Donovan that the victim had had a bottle in his hand at the time of the wounding. Cunliffe denied having said anything of the sort.

After the accused had given evidence Donovan was called on his behalf and counsel for the defence attempted to examine him about Cunliffe's previous contradictory statement. The learned Common Serjeant refused to allow this evidence to go in although he was referred to p. 526 of Archbold's *Criminal Pleading and Practice*, 23rd ed., which sets out section 4 of the 1865 Act:

> " If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the

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[1] [1958] Crim.L.R. 133.

> indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

The ruling of the Common Serjeant was rather surprising, for Archbold continues (immediately after setting out the section in full):

> "This enactment is wide enough to cover all statements but is especially applicable to a statement not in writing. The witness may be cross-examined on such statement; and if he denies it another witness may be called to prove it."

Archbold makes no mention of any necessity of the statement being a sworn one, but at the trial the following exchange took place:

> "*Common Serjeant*: Yes. I see. But this is not something sworn differently at another place. If this witness was saying something today quite different to what he had sworn in another place, you would be perfectly entitled to put to him the deposition made in the other place, but you are now seeking to get from him a conversation which he had with a person not concerned with the crime, other than as a witness. I do not think that section covers any such situation.
>
> "*Counsel*: With great respect, the provisions of the section do not in any way qualify the circumstances in which the original statement was made.
>
> "*Common Serjeant*: With respect to you, you are not challenging *any original statement*. If you were, I should of course be disposed to allow you to put to this witness anything he said on a previous occasion. You are asking him to give an account, not contrary to anything he said before, but in respect of some conversation which took place between him and somebody else.
>
> "*Counsel*: It is not this witness I am challenging, but another witness.
>
> "*Common Serjeant*: I think you will have to take that other witness's answer."

It is relevant to remark that an advocate does not as a rule challenge "any original statement"; it is the subsequent statement which conflicts with it which he attacks, because it is not so helpful to his case as the previous one. No advocate would cross-examine a witness to show that he previously made a statement *less* favourable to his client.

The Court of Criminal Appeal had no difficulty in holding that the summary of the law in Archbold was correct, and that the

Common Serjeant was wrong in excluding the evidence of Donovan about Cunliffe's previous statement merely because that statement had not been on oath. However, the court further decided that Donovan's evidence would probably not have made any difference to the verdict as the jury had clearly accepted Cunliffe's story that the victim had not had a bottle in his hand: Cunliffe had been accepted as a witness of truth. This assumption, it is submitted with respect, goes a little further than the facts warrant. After hearing Donovan's evidence in full the jury might very well have refused to accept any of Cunliffe's evidence—in which case, of course, the accused's case would have been considerably strengthened. In a critical article about the Court of Criminal Appeal in *The Times* on the day following the appeal (December 19), Glanville Williams wrote: " Mr. Justice Humphreys, for instance, used to assert that in his opinion juries were always right, unless they had been misled by a slip in the application of the laws of procedure and evidence." In the present case the jury must have been misled by such a slip, but the Court of Criminal Appeal did not appear to think that this mattered, for having brushed Donovan aside in the manner described, the court decided to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907: the court dismissed the appeal as it considered that no substantial miscarriage of justice had occurred.

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1958

The Sentencing Powers of Quarter Sessions

By C. E. S. HORSFORD, *Barrister-at-Law*

Passing Sentence

The court may always alter or vary a sentence during the continuance of the session, and may order that sentences shall run concurrently or consecutively to each other or to another sentence which the offender is undergoing at the time.

For a common law misdemeanour for which no other penalty is fixed, the court can fine or impose imprisonment without limit within the bounds of reasonableness, or can deal with the offender in any manner under the Criminal Justice Act, 1948, which it has power to do.

A court should not normally take into account a possible remission of sentence but should pass the sentence which it considers the gravity of the case deserves. (*Maguire*, *Enos*, 40 Cr.App.R. 92.) Since the abolition of hard labour, penal servitude and prison divisions by section 1 of the Criminal Justice Act, 1948, there is now only one form of imprisonment which the court has power to award, and a court of quarter sessions may not impose imprisonment on any person under the age of fifteen in any case, nor under the age of twenty-one, unless it considers, in that latter case, that no other method of dealing with the offender is appropriate (Criminal Justice Act, s. 17 (2)).

Under section 7 of the Criminal Justice Justice Act the court has power to discharge an offender either absolutely or conditionally upon his being of good behaviour for the next twelve months. No other conditions can be placed on this latter order, but the court must tell the offender that if he commits any offence during the ensuing twelve months he is liable to be sentenced for the offence of which he has just been convicted.

Before passing a sentence of preventive detention, corrective training or an order under section 22 of the Criminal Justice Act, 1948, it is essential that a notice of previous convictions under section 23 of the Criminal Justice Act shall have been served on the court and on the offender at least three clear days before the trial, and that these convictions are either admitted by or proved against him in court.

Section 22 of the Criminal Justice Act requires that the court *shall*, if it sentences an offender liable to this order to twelve months' imprisonment or more, order that he shall be subject to supervision by the proper authorities in accordance with the provisions of the section for twelve months after his next discharge from prison. The section does, however, allow the court not to make this order in special circumstances including the character of the offender, but, as a matter of practice, these circumstances must necessarily be rare. Persons liable to this order are persons who are convicted on indictment with an offence punishable with two years' imprisonment or more, and who have on two previous occasions been convicted of offences for which they were sentenced to Borstal training, imprisonment or corrective training.

Committals for sentence

Under section 29 of the Magistrates' Courts Act, 1952, a magistrates' court may commit an offender in custody to quarter sessions for sentence if, upon summary conviction for an indictable offence, the court is satisfied, having regard to his antecedents and character, that the offence warrants a punishment more severe than that court has power to award.

The court of quarter sessions can deal with him in any way that it could have dealt with him had he been convicted of that offence on indictment at quarter sessions.

It is to be remembered that where a young offender is committed to quarter sessions for Borstal sentence under section 28 of the Magistrates' Courts Act, 1952, and the court does not sentence him to Borstal training, it can only deal with him in that case as the magistrates' court could have done.

In passing sentence, the court may deal with breaches of any current probation order or order for conditional discharge made at a magistrates' court, which the conviction before it has occasioned, for which a separate sentence should be passed.

There is no right of appeal to quarter sessions against a committal for sentence under section 29 of the Magistrates' Courts Act, 1952 (*R.* v. *London Sessions, ex p. Rogers* [1951] 2 K.B. 74); but there is a right of appeal against the conviction which gave rise to the committal provided that the accused did not plead guilty.

Postponing sentence

Quarter sessions has inherent jurisdiction to postpone sentence (*Spratling*, 5 Cr.App.R. 210).

" Where an adjournment of a case is made from session to session, as distinguished from the sessions being themselves adjourned, the session to which the adjournment is made is competent to pass the sentence" (Pritchard, 2nd ed., p. 34).

One court of quarter sessions may pass sentence on a conviction obtained at another session (*Pepper*, 16 Cr.App.R. 12; *cf. Richardson*, 8 Cr.App.R. 159).

Should the court postpone sentence and/or trial until the following session, it has power to order that the sentence be computed from the session in which the accused was convicted or first appeared, if so desired. This particularly applies in the case of trials postponed to later sessions (*e.g.*, for want of time to try), where the postponement was not upon the application of the accused nor through any fault of his.

Consecutive and concurrent sentences

Where an accused person is convicted of more than one offence, a separate sentence should be passed in respect of each such offence, unless one sentence is passed on the whole indictment. Further, it should be clearly stated by the chairman whether any such sentence is to be concurrent with any other sentence or consecutive thereto. Consecutive sentences for misdemeanour may be passed by common law and for felonies by section 10 of the Criminal Law Act, 1827 (see *Greenberg* [1943] K.B. 381).

A sentence of imprisonment ought not to be passed to run consecutively to a sentence of corrective training (*Talbot* [1953] 1 Q.B. 613).

Consecutive sentences of Borstal training should never be passed (*Beamon* (1948) 38 Cr.App.R. 181).

The Nature of the Sentence

Recognisance

A recognisance is the declaration in a solemn stated form by a person of his or her admission that he or she is under a legal obligation to do or refrain from doing some specific act, *e.g.*, keep the peace, either generally or as regards some named person, be of good behaviour, abstain from intoxicating liquor, and so forth (Magistrates' Courts Act, 1952, s. 91, and Licensing Act, 1902, s. 3). Such a declaration is usually accompanied by an undertaking to pay to a named recipient, *e.g.*, the reigning monarch, a named sum of money and a statement that if such payment shall not be made if and when it becomes due, then the real and personal property of the person entering into the recognisance shall be liable to be distrained upon to the extent of the monetary obligation so fixed.

A recognisance must not be used as a means of making people pay their debts (*Peel*, 29 Cr.App.R. 73).

The court has powers to require some person other than an accused person to enter into a recognisance as a surety by way of additional security for an accused person's performance of the conditions of the recognisance.

Breach of recognisance

The breach must be strictly proved, *viz.*:—

1. The person before the court must be identified as the person under recognisance. The normal method of proof is the calling of some person to testify who was present when the person before the court was bound by the recognisance and can identify him as being that person and by the production of the record or a proper certificate or memorandum thereof.

2. Proof must be given that the person before the court has committed a breach, *e.g.*, by committing and being convicted of a subsequent offence. Here again, proof of identity, etc., must be given exactly as in para. 1. As to the proper procedure, see *Trefor David*, 27 Cr.App.R. 50, modifying *Pine*, 24 Cr.App.R. 10.

3. Where the breach alleged is something other than a crime the facts must be proved as strictly as where the alleged breach is the commission of an offence (*McGarry*, 30 Cr.App.R. 187).

4. The court must be informed by some proper means, of the exact terms of the recognisance and, where the recognisance was reduced into writing, the document should be produced (*McGarry*, 30 Cr.App.R. 187).

5. The person before the court must be given an opportunity of cross-examining any witness called to prove the breach.

6. He must be given an opportunity to:—
   (a) Deny the breach, the nature of which must be carefully explained, to give evidence on oath or to make a statement not on oath and to call witnesses in support of such denial.
   (b) If the breach is proved, to address the court by way of excuse, explanation or mitigation.

On proof of a breach of recognisance the court may punish the offender for the breach by estreating the recognisance and/or it may sentence him for the original offence.

The question whether there has been a breach of recognisance is not triable by jury, but it is for the court to determine upon proper evidence.

The case for the Crown should be presented by counsel (*McGregor*, 30 Cr.App.R. 155).

At common law a court of quarter sessions has inherent jurisdiction to bind over an accused person to, *e.g.* (a) appear before it on a named date, or (b) do or refrain from doing a specified act or acts, *e.g.*, be of good behaviour. Such recognisances may be accompanied by those of a surety or sureties.

In the case of a recognisance imposed by a magistrates' court under the Justices of the Peace Act, 1361, there is now a right of appeal to quarter sessions (Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956, s. 1).

Fine

By section 13 of the Criminal Justice Act, 1948, it is enacted that " any court before which an offender is convicted on indictment of felony (not being a felony the sentence for which is fixed by law) shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him."

A fine cannot be imposed in addition to an order for conditional discharge or a probation order made in respect of the same offence (*Parry*, 34 Cr.App.R. 224).

At common law there is power to fine for indictable misdemeanours in any amount unless otherwise provided for by statute.

Time can be given for payment of the whole or by instalments, and a term of imprisonment can, and should normally, be set in default of payment, not exceeding twelve months (*ibid*., s. 14).

These provisions also apply to forefeited recognisances.

An estreat roll containing details of all fines and forfeited recognisances imposed at each session is forwarded to the sheriff of the appropriate county who is responsible for collection.

Probation

A person convicted of a grave offence should not be placed on probation even if of good character (*Eversfield* v. *Story* [1942] 1 K.B. 437, and cases there cited).

The making of a probation order by the court is now regulated by section 3 of the Criminal Justice Act, 1948. It is important that the requirements of a probation order should be clearly put to the accused. These include an undertaking to be of good behaviour throughout the period of the order, which can be from one to three years, not to associate with undesirable persons, to obey the instructions of the probation officer, any other lawful requirements including conditions of residence for periods up to twelve months in duration, and conditions under section 4 of the Criminal Justice Act, 1948 (mental deficiency treatment).

A copy of any probation report provided to assist the court should be served on the accused or his counsel.

The Children and Young Persons Acts of 1933 and 1938 make the following provisions:—

1. A person under seventeen must not be ordered to reside in an institution not subject to inspection by the Secretary of State unless to be employed or to seek employment outside.
2. Where residence in an institution is made a condition, notice of the terms of the order must be given to the Secretary of State.
3. Where residence is a condition the Secretary of State may take steps to have it excluded or altered.

Breach of probation. A breach of a probation order may be constituted by the commission of another offence during the probation period, or the failure to observe one or more of the conditions of the order (*e.g.*, residence). In either case, a court of quarter sessions may order the offender to appear before it to be dealt with, or a magistrates' court acting as the supervising court may commit the offender to quarter sessions for the breach (Criminal Justice Act, 1948, ss. 6 and 8).

This only applies where the original probation order was made by that court of quarter sessions.

Where a person is brought before the court upon breach of a probation order, the terms of the probation order and the subsequent breach alleged should be clearly put to the accused and he should be asked if he admits those facts. If he does not, the court must try the issue without a jury and pronounce whether it finds the breach to have been proved or not (see *Practice Note, R.* v. *Devine* [1956] 1 All E.R. 548).

This procedure should also be followed in the case of a breach of an order for conditional discharge occasioned by the commission of another offence during the period. The court may then deal with the offender for the original offence.

A court of quarter sessions has power to deal with breaches of probation orders and orders for conditional discharge made at magistrates' courts in respect of persons before it, and should in fact do so, but such breaches should be the subject of separate sentences, and not merely be taken into account.

Detention centre

Where a court has power to sentence a person between the ages of fourteen and twenty-one years to imprisonment, it may order such person to be detained in a detention centre for a term of three months (Criminal Justice Act, 1948, s. 18).

The minimum age is fourteen years, notwithstanding the provisions of section 17.[1]

Section 18 also allows the court to impose six months' detention in serious cases where the term of imprisonment it could have awarded is more than six months.

No person shall be sent to a detention centre if he has previously been sentenced to Borstal training or imprisonment, or if he is not less than seventeen years of age and has been detained in a detention centre since attaining that age; nor in any other case unless no other method is considered by the court to be appropriate (*ibid.*, s. 18 (2)).

Borstal

A person convicted on indictment of an offence punishable with imprisonment may, if he is between sixteen and twenty-one years of age, be sentenced to Borstal training (Criminal Justice Act, 1948, s. 20 (1)).

A person of the same age may also be committed in custody by a magistrates' court, upon conviction of an offence punishable summarily with imprisonment to quarter sessions for sentence under section 28 of the Magistrates' Courts Act, 1952, and that court can, if it thinks fit, pass a sentence of Borstal training.

Before passing any such sentence the court shall consider a report from the Prison Commissioners as to the accused's suitability for Borstal training, and a copy of such report should be served on the accused or his counsel (Criminal Justice Act, 1948, s. 20 (7)).

In cases of committal for sentence under section 28, the Crown should be represented by counsel.

Consecutive sentences of Borstal training should never be passed (*Beamon* (1948) 32 Cr.App.R. 181).

Where a sentence of Borstal training is passed for a substantive offence and the offender is in breach of a probation order or order for conditional discharge, a nominal sentence of one day's imprisonment should be passed in respect of the earlier offence for which the offender was placed on probation or conditionally discharged (*Fry* (1954) 38 Cr.App.R. 157; five days' imprisonment if the order was made by a magistrates' court).

Corrective training

A person who is not less than twenty-one years of age convicted on indictment of an offence punishable with two years' imprisonment or more, and who has been convicted on at least two previous occasions since the age of seventeen of offences punishable on indictment with such a sentence, may be sentenced by the court to a period of corrective training (Criminal Justice Act, 1948, s. 21 (1)).

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[1] Before passing such a sentence, the court should satisfy itself as to the availability of a vacancy.

The court may award from two to four years, but as a general rule three years should be regarded as the minimum (*Grant,* 34 Cr.App.R. 230).

Corrective training should not normally be imposed on a defendant over the age of thirty, nor should a term of imprisonment be imposed to run consecutively to a sentence of corrective training (*Talbot* (1954) 37 Cr.App.R. 23, and *Hedgecock* (1957) 41 Cr.App.R. 136).

A notice of previous convictions under section 23 of the Criminal Justice Act, 1948, must have been served on the prisoner and the court at least three days before the trial.

Before sentencing any offender to corrective training the court shall consider a report from the Prison Commissioners as to his suitability for such a sentence (*ibid*., s. 21 (4)).

Two separate " convictions on previous occasions " at separate courts or sessions are required (*Rogers* (1953) 36 Cr.App.R. 203).

The court is not bound to pass a sentence of corrective training merely because the conditions have been fulfilled or because the Prison Commissioners report that the offender is suitable for such a sentence. All the circumstances should be considered by the court, but where the Prison Commissioners do not recommend an offender for such a sentence it should not be passed upon him (*Apicella* (1949) 34 Cr.App.R. 29, and *Murray* (1950) 34 Cr.App.R. 203).

Preventive detention

Under section 21 (2) of the Criminal Justice Act, 1948, the court may sentence to preventive detention a person who:

(1) is not less than thirty years of age (at the date of conviction) and is convicted on indictment of an offence punishable with two years' imprisonment or more, and

(2) since the age of seventeen has been convicted of at least three offences carrying such a sentence on two at least of which he was sentenced to imprisonment, Borstal or corrective training.

Before sentencing any offender to preventive detention the court shall consider a report from the Prison Commissioners as to his fitness for such a sentence.

The court is not bound to pass a sentence of preventive detention merely because the conditions have been fulfilled or because the Prison Commissioners report that the offender is suitable for such a sentence. All the circumstances should be considered by the court, but where the Prison Commissioners do not recommend an offender for such a sentence it should not be passed upon him (*Apicella* (1949) 34 Cr.App.R. 29, and *Murray* (1950) 34 Cr.App.R. 203).

Preventive detention should be regarded as an exceptional sentence and only awarded in cases where prolonged detention has become necessary for the protection of the public (*Askew* [1949] 2 All E.R. 687).

The period can be from five to fourteen years, but seven years should be regarded as the minimum (*Sedgwick* (1949) 34 Cr.App.R. 156).

A notice of previous convictions under section 23 of the Criminal Justice Act, 1948, must have been served on the prisoner and the court at least three days before the trial.

It will not be sufficient for this purpose to aver on the notice a previous sentence of preventive detention. The convictions rendering him liable to that sentence will have to be set out, or other convictions as in (2) above, if any (*Evans* [1956] 3 W.L.R. 978).

The three previous convictions alleged must be separate convictions at separate courts or sessions (*Rogers* (1953) 36 Cr.App.R. 203).

Practice and Procedure

Magistrates' Courts

Exclusions from notices of previous convictions

Prior to the passing of the Magistrates' Courts Act, 1957, it was held by many magistrates' courts that, if an accused person was convicted *ex parte,* any previous convictions which might be recorded against him could not be brought to the notice of the court except by formal proof of them, because the defendant was not present to be asked whether he admitted them. Other courts saw no reason why evidence of character should not be given after an *ex parte* conviction, and considered that such evidence of character could, as in other cases, include hearsay statements of previous convictions. On this view of the matter strict proof of a previous conviction was required only where the conviction was used to justify a higher penalty than could be imposed for a first offence.

Section 3 of the Magistrates' Courts Act, 1957, enacts that where an accused is convicted in his absence after having been served with a notice specifying any alleged previous conviction, the court may "take account" of it "as if the accused had appeared and admitted it." In the case of those statutes which provide a rising scale of penalties for repeated offences, the court is accordingly entitled, provided the conditions of section 3 are fulfilled, to treat its conviction as a second or third one—as the case may be—without direct proof of the former occasions. In addition to this particular instance, such previous convictions may, of course, be taken into account generally in assessing penalties within the maximum allowable. It should be noted, however, that the new procedure applies only to previous convictions for summary offences and therefore would not cover, for example, the case of a motoring defendant who, after electing to be tried by a jury, had been previously convicted on indictment of dangerous driving (see section 25 (6) of the Magistrates' Courts Act, 1952).

This sort of case is comparatively rare, but another exception to the scope of section 3 of the 1957 Act is likely to be of much more frequent occurrence and, in the experience of the writer, at least, has not always been recognised by prosecutors as an exception. Section 12 of the Criminal Justice Act, 1948, lays down that where a person is convicted and put on probation or conditionally or absolutely discharged, the conviction is to be "deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act." This means that an adjudication of this kind is not a " previous conviction " for the purposes of any statute authorising any increased penalty on a further conviction; and, by the same token, it should not be specified in any notice served under section 3 of the Magistrates' Courts Act, 1957. If, inadvertently, it were included in any notice of previous convictions it could not be " taken into account " by the court under the terms of that section.

It does not seem just that a defendant, by not appearing to his summons, should enjoy the status of a first offender merely because he was dealt with leniently after being convicted on a former occasion. He might even be given again an absolute discharge by reason of what would appear to the court to be an unblemished record. However, courts which, before the new procedure, insisted on strict proof of previous convictions against absent defendants will presumably have to accept this unsatisfactory situation unless the prosecution is ready with the required evidence. Other courts may receive hearsay concerning the previous court appearance as evidence of character additional to any previous convictions which may be proved by virtue of section 3 of the 1957 Act. [A. E. JONES.]

Failure of examining justices to sign depositions

In *R.* v. *Parr and others* (Central Criminal Court, January 7, 1958) six defendants were charged in an indictment containing four counts. Counts 1 and 2 charged all the defendants with shopbreaking and, alternatively, receiving stolen property. Counts 3 and 4, against Rooney only, charged receiving stolen property. The depositions of the witnesses in the lower court had been recorded on three separate days, and a jurat (Form 9) had been prepared for each day recording the names of the witnesses examined on that day. The first and third jurats were signed but the second bore no signature.

On the prisoners being arraigned before His Honour Judge Maude all pleaded not guilty and were placed in charge of a jury. One prisoner, Edgar, changed his plea and a verdict of guilty on count 2 and not guilty on count 1 was recorded against him. On the prosecution asking that the evidence of a conditionally bound over witness be read, the Clerk of the Court noticed for the first time that the second jurat bore no signature and the jury were discharged from giving a verdict in respect of the prisoners still in their charge.

The prosecution having obtained leave to prefer a voluntary bill against one of the prisoners, Rooney, on a charge of receiving stolen property, the count being particularised in identical terms with count 4 of the original indictment, the case was put in the list for hearing before His Honour Judge Aarvold on both indictments.

Counsel for the defence applied for and obtained leave to apply after arraignment to quash the indictment (*R.* v. *Heane,* 9 Cox 433) and after his attention had been drawn to the Interpretation Act, 1889, s. 1 (1), Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), Justices of the Peace Act, 1949, s. 15, Magistrates' Courts Act, 1952, ss. 7 (1), 122 (1) (*a*), Magistrates' Courts Rules, 1952, Magistrates' Courts (Forms) Rules, 1952, *R.* v. *Phillips and Quayle* (1938) 26 Cr.App.R. 200, *R.* v. *Parker* (1870) L.R. 1 C.C.R. 225, *R.* v. *Young* (1850) 3 C. & K. 106, *R.* v. *Lee* (1864) 4 F. & F. 63 and *R.* v. *Gee* (1936) 25 Cr.App.R. 198, Judge Aarvold ruled:—

1. Failure to sign some of the depositions did not *ipso facto* invalidate the proceedings *in toto.*
2. There could be no valid committal based on unsigned depositions or on depositions not supported by a validly signed jurat.
3. Where some depositions were not supported by a properly signed jurat and others were, the committal on each count being deemed to be a separate committal, a committal on any particular count could be good if it could be supported by the evidence disclosed in the valid depositions.
4. On the facts counts 1 and 4 must be quashed and count 2 must be quashed as against prisoners Reardon and Douglas (who were accordingly discharged).

A motion in arrest of judgment on behalf of Edgar failed on the same grounds.

The trial proceeded against Parr, Pontica and Rooney on count 2, and against Rooney on count 3, of the original indictment. [C. B. ORR.]

Summary Justice

Food and drugs

Storing ice cream with the intention of selling it without being registered for the purpose contrary to the provisions of section 16 of the Food and Drugs Act, 1955; the accused was the licensee of a public-house where food was not prepared or served; fined £5; Bounds: Old Hill Magistrates' Court (*Birmingham Mail*, January 29).

Gaming

Being found on premises when used as a gaming house, the premises having been entered by the police in pursuance of section 3 of the Gaming Act, 1845; fined £1 (the fine was imposed in pursuance of the Metropolitan Police Act, 1839, s. 48); Taylor: Clerkenwell Magistrates' Court (85 *Journal of Criminal Law* 8, November 22, 1957).

Conducting a lottery outside a shop: the accused had a bubble gum machine containing trinkets outside his shop; a child inserting a penny would get his bubble gum and sometimes a trinket as well; conditional discharge on payment of £10 10s. costs; Wheeldon: Bradford Magistrates' Court (*Manchester Guardian*, February 4).

Using a shop for the purposes of ready-money betting and using the premises where persons resorting thereto might effect pool betting transactions; fined £40 on first charge, given a conditional discharge on the second, ordered to pay £8 8s. costs; Chambers: North Shields Magistrates' Court (*Manchester Guardian*, January 15).

Road traffic

Getting on a bus without reasonable cause or authority; the accused climbed into the driving seat while the driver was talking to the conductor; fined £3, ordered to pay 12s. costs; Radnor: Solihull Magistrates' Court (*Birmingham Mail*, January 28).

Salvation Army cornet player, playing "Hark! the herald angels sing" as he rode along, crashed into another cyclist, charged with riding without consideration; discharged on payment of 4s. costs; Clack: Oxford Magistrates' Court (*Daily Mail*, January 22).

Taking a bus and driving it without insurance; fined £10, licence endorsed; Bowes: Middlesborough Magistrates' Court (*Manchester Guardian*, January 14).

Case and Comment *

Bankruptcy—*Fraudulently obtaining property on credit—any false representation or other fraud*

R. *v*. KLEIN [1] (Central Criminal Court: His Honour Judge Aarvold: January 7, 1958).

M. K. was charged on an indictment containing five counts alleging that he has been adjudged bankrupt and on . . . within twelve months next before the presentation of a bankruptcy petition against him obtained . . . from . . . by falsely representing that he was then carrying on an honest and genuine business as a market trader or by fraud other than false representations and has not paid for the same. These counts had been substituted for the charges on which the defendant had been committed for trial. On an application to quash the defence submitted that the other fraud alleged must be similar to false representation, *Ex p. Brett* (1875) 1 Ch.D. 151, C.A. *R.* v. *Jones* [1898] 1 Q.B. 119, C.C.R., could be distinguished as there the operative words, under section 13 of the Debtors Act, 1869, are " or any other fraud." The depositions did not reveal that the defendant was carrying on anything but an honest and genuine business nor did they reveal any other false representation. In reply the prosecution submitted that *Brett* was not binding on the court being a decision of the Court of Appeal and it was inconsistent with *R.* v. *Jones*. Mellish L.J. said " I think there must be, etc." (Wigoder " I hope my learned friend does not mean to imply that the Court of Criminal Appeal do otherwise "). Pretending to buy without intending to pay is fraud other than false pretences, *R.* v. *Thompson* (1910) 5 Cr.App.R. 9. The whole judgment in *R.* v. *Carpenter* (1911) 22 Cox 618, was pertinent. Judge Aarvold ruled that it was not certain that the observations of Mellish L.J. were still good if intended to limit other fraud to fraud similar to false representation and that the facts set out in the depositions could support the indictment. On being arraigned the defendant pleaded guilty and was fined £500, to be paid within four months, or in default twelve months' imprisonment. He was also ordered to pay £105 costs of the prosecution.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the prosecution: *Christmas Humphreys* and *J. H. Buzzard* (instructed by the Director of Public Prosecutions). For the defence: *B. Wigoder* (instructed by Shindler & Co.).

[C. B. Orr, *Barrister-at-Law*.]

COMMENTARY. In *R.* v. *Jones,* where the prisoner ordered and consumed a meal knowing that he had only one halfpenny, but making no express representations, it was held that there was no evidence of a false pretence but that he was guilty of obtaining credit by fraud under section 13 of the Debtors Act, 1869. In *Ex p. Brett* a trader who was insolvent purchased goods on credit, shipped them to Australia, and raised money (less than the price of the goods) on the bills of lading. An obvious difference between the two cases is that it is in the ordinary course of business (as was pointed out by Mellish L.J.) for an exporter to buy goods on credit and to raise money on them, when exported, by pledging the bills of lading. But it is certainly not in the ordinary course of business to order a meal in a restaurant without having immediately available the money to pay for it. The exporter certainly cannot be taken to represent when he buys goods on credit that he has the present means to pay. It is not so clear why there is no implied representation of present fact by the man in the restaurant. A person who obtains goods by giving a cheque is held impliedly to represent (a) that he has authority to draw on the bank for the sum stated, (b) that the cheque is a good and valid order for the payment of its amount, and (c) that he has a banking account with the bank upon which his cheque is drawn: *R.* v. *Hazelton* (1874) L.R. 2 C.C.R. 134. In view of the universal requirement of restaurants that customers should immediately pay for the goods consumed, it would surely have been no less reasonable to hold that a customer who orders a meal represents that he has the money to pay for it? But *Jones* establishes the contrary.

Binding Over by Justices—*Justices of the Peace Act, 1361—whether appropriate to restrain breach of by-law*

BAMPING *v.* BARNES [2] (Blackpool Quarter Sessions: J. D. Robertson Crichton, Q.C., Recorder: January 6, 1958).

The appellant pleaded guilty before the justices to an offence created by a by-law of the Blackpool Corporation in 1896 under the authority of the Municipal Corporation Act, 1882, namely that he "in a street within the borough of Blackpool to the obstruction of a person verbally importuned a person for the purpose of obtaining the custom of the last named person." The maximum penalty provided by the by-law is a fine of forty shillings.

The justices fined the appellant forty shillings and also made an order under the Justices of the Peace Act, 1361 (34 Edw. 3,

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[2] For the appellant: *W. F. N. Perry.*
For the respondent: *G. W. Guthrie Jones.*

c. 1), that the appellant do find sufficient surety for his good behaviour during the period of twelve months the next ensuing. In default of compliance with that order the justices ordered that the appellant be imprisoned for eight weeks. The appellant appealed against the making of the binding over order.

The facts were that the appellant carried on the business of photographer in premises abutting on the promenade. He admitted that on many occasions he had left his premises to solicit the custom of passers-by, and had taken photographs while both they and he stood on the pavement.

He had previously been convicted for the offence in 1954, 1955, 1956 and on four occasions in 1957.

Counsel for the appellant submitted first that it was inappropriate to invoke the powers of justices under the Act of 1361 where the offence was the particular creation of a by-law of minor importance, and that the only reported case in which a binding over order made by the justices had been upheld in which a breach of the peace had not been threatened was *R.* v. *Sandbach, ex p. Williams* [1935] 2 K.B. 192, where continued interference with the police was threatened: secondly, that the use of the powers increased the penalty for the breach of the by-law, since the appellant must be imprisoned if he failed to find sureties. It was difficult for him to find sureties since any failure by him to be of good behaviour might be held to be a breach of his recognisance, whereupon the sureties might be called upon to forfeit their bonds.

Held, while the invocation of the powers given to the justices under the 1361 Act in the present case was an extension of the powers beyond any reported case, it was not essential to the proper exercise of the justices' power of binding over that actual breach of the peace in the sense of violence must either directly or indirectly be threatened. A binding over order was applicable to all cases where it is apprehended that a person will do something against the law.

Per curiam: " In considering whether it is right for justices to make a binding over order emphasis is laid upon persons committing in future any breach of the law, rather than upon the particular law that it is apprehended that those persons will in future break. . . .

" If the [justices] had before them a person who has persistently broken this by-law in the past and there is good ground for concluding that he is likely to go on breaking this by-law in the future, it is entirely appropriate for the justices to invoke their powers of binding him over, it is, indeed, their duty to do so. . . ."

The justices would not be acting within their judicial discretion

. . . to require sureties to forfeit their recognisances in respect of offences which were not the same as or similar to the offence anticipated.

[PETER G. SMITH, *Barrister-at-Law*.]

COMMENTARY. Binding over may be (a) to keep the peace or (b) to be of good behaviour. The former is a common law power, the latter depends upon the Justices of the Peace Act, 1361. The statutory power is wider than the common law power since " good behaviour " includes keeping the peace and a good deal more besides.

Until the Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956, there was no appeal from a binding over order. When an order is made or judgment given by a competent court, no appeal will lie to any court except by virtue of a statute. Until the recent Act statute authorised appeals from magistrates' courts only when there was a conviction, and a Divisional Court held, in *R.* v. *County of London Quarter Sessions Appeals Committee* [1948] 1 K.B. 670, that a binding over order is not a conviction. Even where the accused was convicted of an offence and fined, and, in addition, bound over to be of good behaviour, it was held that the binding over order was not an order made " on conviction " within the meaning of section 36 (1) of the Criminal Justice Act, 1948, since it could have been made whether the accused was convicted or not: *R.* v. *London Sessions* [1951] 1 K.B. 557.

It was held in *R.* v. *Sandbach* [1935] 2 K.B. 192 that magistrates may lawfully require sureties for a sum greater than the maximum fine which could be imposed for the offence itself. " Thus one of the most frequent occasions on which this hoary statute is invoked is when a petty delinquent—*e.g.*, a street trader, a rag merchant, or a street bookmaker or his ' runner '—has repeatedly committed the same offence; the penalty for it is perhaps trifling, and he is cheerfully prepared to pay it again and again as a regrettable but inconsiderable part of his business expenses ": C. K. Allen, *The Queen's Peace*, 65. See also Glanville Williams, " Preventive Justice and the Rule of Law," 16 *Modern Law Review* 417.

Evidence—*Inducement to make a statement to the police—admissibility of consequent statement*

R. *v.* JOYCE [3] (Central Criminal Court: Slade J.: November 11, 1957) ([1957] 3 All E.R. 623).

J. was charged on indictment with incest and indecent assault. On the morning of Sunday, July 28, 1957, certain accusations were made to the police against the accused. At about 11.30 p.m. that night two police officers visited the accused at his home, and although he had retired to bed, they nevertheless invited him to accompany them to the police station, one of the officers saying, "I need to take a statement from you." The accused, thinking he had little choice in the matter, accompanied the police to the police station; there he made a written statement which was alleged by the prosecution to contain an admission. At his trial it was contended on his behalf that such a statement was inadmissible, being obtained by reason of an inducement held out to the accused.

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[3] For the Crown: *J. H. Buzzard* and *John Worsley* (instructed by the Director of Public Prosecutions). For the defendant: *A. S. Wells* (instructed by A. A. Kassman).

Held, that although there had been an inducement, in the colloquial sense, held out to the accused in the invitation of the police both to accompany them to the police station and there to make a statement, it was an inducement insufficient in law to render an admission resulting from it inadmissible. To render an admission admissible, the prosecution must prove that no inducement *relating to the charge or accusation* was held out to the accused to make it: and this, in the present case, the prosecution had done. The evidence was accordingly admitted. [D. C.]

COMMENTARY. The judge stated the rule (with slight variations) in the form in which it is put in Kenny, *Outlines of Criminal Law* (16th ed.), 428. He said: "A confession or admission must be excluded if it is made (i) in consequence of (ii) any inducement (iii) of a temporal character (iv) connected with the accusation or relating to the charge (v) held out to the accused by a person having some authority over the subject-matter of the charge or accusation."

The principle underlying this rule is traditionally stated to be that confessions made in such circumstances are involuntary and therefore unreliable: see *R.* v. *Warickshall* (1783) 1 Leach 263. It is not apparent why an inducement connected with the charge or accusation should be deemed the only sort of inducement to have this effect. Kenny's authority is *R.* v. *Lloyd* (1834) 6 C. & P. 393, where the prisoner on a charge of larceny was urged to confess (a) "because Mrs. Garner can ill-afford to lose the money," and (b) by a promise that, if he did, he should see his wife. Patteson J. held that this inducement did not exclude the confession. This is but slender authority and it may be doubted whether it justifies the general proposition which Kenny based upon it. If a suspected person were told he would be tortured if he did not confess, this "inducement" would not be "connected with the accusation," but it could hardly be held that it would not exclude a statement made in consequence.

Homicide—*Diminished responsibility*

R. *v.* SPRIGGS[4] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Salmon JJ.: January 13, 14, 1958) (*The Times*, January 14, 15, 1958).

S. was convicted at Assizes of capital murder. The defence at the trial was that S. was suffering from diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. S. appealed to the Court of Criminal Appeal on the ground that the trial judge did not give a sufficient direction to the jury as to the meaning of "abnormality of mind" or "mental responsibility." The terms of section 2 (1) of the Act had been handed to the jury and they had been directed that it was for them to decide whether S. was suffering from such abnormality of mind as to impair his mental responsibility.

Section 2 (1) of the Homicide Act, 1957, provides that where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

Held, dismissing the appeal, that the trial judge was right to leave the question of diminished responsibility to the jury because there was evidence upon which the jury could have found that this was a case of diminished responsibility. Where Parliament had laid down a definition, it was not for the judge to redefine or attempt to define that definition. It would only confuse the jury to go into metaphysical distinctions between what was emotion and what was intellect. All the judge could do in summing-up was to read the section to the jury and to say: "that is what Parliament has said amounts to diminished responsibility and justifies a verdict of manslaughter and not a verdict of murder. Those are the tests you have to apply. You are to consider whether he has abnormality of mind whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury. If you can find any of those matters in the evidence, then you will find a verdict of manslaughter and not a verdict of murder." Accordingly the appeal would be dismissed.

Per Lord Goddard C.J. (in the course of argument): The purpose of section 2 (1) was to enable the jury to find a merciful verdict if they thought the accused was almost, but not quite, mad. [H. P.]

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[4] For the appellant: *Graham Swanwick Q.C.* and *C. H. Durman* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. K. Brown* (instructed by the Director of Public Prosecutions).

COMMENTARY. According to counsel for the appellant it had been put (presumably by prosecuting counsel) that the appellant had a high intelligence quotient and could not therefore be suffering from abnormality of mind. There was, however, a good deal of medical evidence to show that he lacked ability to control his emotions, and counsel for the accused apparently submitted at the trial that such conditions did come within the ambit of section 2 (1). It was now argued that, where there were such rival submissions, it was incumbent on the trial judge to give the jury guidance. It is submitted with respect that there is a great deal of force in this argument. If there had not been argument as to the meaning of the section, then the course taken by the judge and approved by the Court of Criminal Appeal would seem, with respect, to be entirely justifiable; but in the actual circumstances the judge apparently left the jury free to choose between the alternative interpretations of the statute which had been advanced. Yet the construction of statutes is a matter of law and exclusively within the province of the judge.

The Lord Chief Justice pointed out that it would be confusing for juries to go into " metaphysical distinctions between what was emotion and what was intellect." But if the jury chose to follow the view advanced by the prosecution, they would be undertaking to do just that. The defence's view, on the other hand, would have avoided this by requiring the jury to consider the whole of the accused's mentality.

It is not entirely clear to the commentator what answer Scottish law would give to the problem raised in the present case. It appears that " psychopathic personality " is not, in itself, a defence, nor is it enough to show that an accused has a very short temper, or is unusually excitable and lacking in self-control; but it is not clear whether the emotional element is excluded altogether. See Professor T. B. Smith, " Diminished Responsibility " [1957] Crim.L.R. 354, and Appendix 8 (b) to the Report of the Royal Commission on Capital Punishment, where a number of Scottish judicial pronouncements are collected.

The Attorney-General has refused to grant his fiat for an appeal to the House of Lords.

Poultry—*Failure to keep records—" poultry dealer "*

WERNICK *v.* GREEN[5] (Q.B. Divisional Court: Lord Goddard C.J., Devlin and Pearson JJ.: December 6, 1957).

W. purchased and sold poultry for slaughter. Some of the poultry purchased, before being so sold, was, however, retained and fed by W. for one day only on his premises. The purpose of the feeding was to keep the poultry alive and to prevent cruelty.

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[5] For the appellant: *P. C. Northcote* (instructed by Sharpe, Pritchard & Co. for Woolley & Co.). For the respondent: *Basil Wingate-Saul* (instructed by The Solicitor, The Ministry of Agriculture, Fisheries and Food).

W. was charged, as a poultry dealer, with failing to keep the records required by article 3 of the Live Poultry (Movement Records) Order, 1954. A poultry dealer is defined in the Order as " a person habitually engaged in the business of buying and re-selling poultry or day-old chicks " ; but the Order also provides that " a person shall not be deemed to be a poultry dealer by reason only that he sells for slaughter poultry which he has purchased and fed for that purpose."

On the hearing of the information, the Wolverhampton stipendiary magistrate was of the opinion that " fed " should be construed to mean " fattened " ; and that since W. had not fed to fatten he was a poultry dealer within the meaning of the Order ; and that since, as a poultry dealer, he had failed to keep the requisite records, he was guilty of an offence. On appeal against his conviction,

Held, that " fed " should be construed in its ordinary sense, and not necessarily as meaning " fattened " ; a bird was none the less fed whether the intention was to prevent it from growing thinner or to cause it to grow fatter. W. was not, therefore, a poultry dealer within the meaning of the Order. The conviction must be quashed. [D. C.]

Road Traffic—*Dangerous driving—" automatism " as a defence*

HILL *v.* BAXTER [6] (Q.B. Divisional Court: Lord Goddard C.J., Devlin and Pearson JJ.: December 5, 6, 19, 1957) ([1958] 2 W.L.R. 76).

B., ignoring a " Halt " sign, drove his van across a road junction, collided with a car and overturned. Later, in hospital, he said that he could not remember what had happened. He was charged with dangerous driving and with failing to conform to a traffic sign, contrary to sections 11 (1) and 49 (*b*) of the Road Traffic Act, 1930. On the hearing of the informations the evidence for the defence was confined to that of B. Two medical reports on B., to which the prosecution did not object, were accepted in evidence by the justices. B. contended that he had become unconscious before reaching the road junction, being overcome by sudden illness. The justices found that he must have exercised driving skill to have reached the vicinity of the road junction; but that at some time before reaching the junction itself he had become unconscious and was therefore incapable of forming any intention as to his manner of driving. Accordingly they dismissed the informations.

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[6] For the prosecution: *Duncan Rankling* (*Anthony Harmsworth* with him) (instructed by Sharpe, Pritchard & Co. for W. O. Dodd, Brighton). For the defendant: *John Alliott* (instructed by Jolly & Co., Brighton).

Held, that the Road Traffic Act, 1930, contained an absolute prohibition against dangerous driving and ignoring a " Halt " sign: the driver's intention was immaterial. There was evidence that B. had driven dangerously and that he had ignored a " Halt " sign. If he sought to rely on the defence of automatism, the onus of proving it was on him, and this he had not done. Since the justices had come to a wrong conclusion in law, the case must be remitted to them with a direction to convict.

Per curiam: Agreed medical reports have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence. [D. C.]

COMMENTARY. The *ratio decidendi* of this case appears to be that there was no evidence upon which it could be found that the accused was in a state of automatism when he did the acts in question. It must be taken—contrary to the finding of the justices—that he was conscious that he was driving and, if so, it was immaterial that he failed to see the " Halt " sign.

This finding involved holding that there was some sort of onus on the accused. The Lord Chief Justice appears to have held it to be a full onus of proof on a balance of probabilities, as in the case where a defence of insanity is raised. Lord Goddard further supported his view by relying on the " rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it." It is well established that there is such a rule: see *R.* v. *Turner* (1816) 5 M. & S. 206; *R.* v. *Oliver* [1944] K.B. 68; *John* v. *Humphreys* [1955] 1 W.L.R. 325 (though it is arguable that the rule goes no further than to require the accused to introduce some evidence and that it does not throw a burden of *proof* onto him. *Cf.* Glanville Williams, *The Criminal Law; The General Part,* § 230). But it is equally clear that it does not extend to *all* cases of facts peculiarly within the knowledge of the accused. Thus where the accused on a charge of murder sets up the defence of accident, or provocation, or self-defence, the facts alleged to constitute the defence will frequently be peculiarly within his knowledge, but this does not throw the onus of proof onto him: *Woolmington* v. *D. P. P.* [1935] A.C. 462; *Mancini* v. *D. P. P.* [1942] A.C. 1; *R.* v. *Lobell* [1957] 1 Q.B. 547. It is submitted, with respect, that the rule should be confined to cases of licences and permissions, where it would be necessary, in order to prove that there was no licence or permission, to call evidence from an inordinately large number of licensing authorities; and similar cases, such as *Huggins* v. *Ward* (1873) L.R. 8 Q.B. 521. It is submitted that it would be contrary to the principle of *Woolmington* to extend the rule so as to relieve the Crown from proving *mens rea* or negligence, where either is a constituent of the crime.

Devlin J. (and Pearson J. expressed agreement with him on this point) pointed out that there are many cases (such as where the accused is found in possession of goods recently stolen) where there is an onus on the accused, not amounting to an onus of *proof*, but " a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt." As the accused had not satisfied even this lighter burden (the " evidential " burden, as it is sometimes called), he must be convicted, and it was not necessary to decide where the ultimate burden of proof lay. Devlin J. expressly said that he wished to reserve this question for further consideration. It is submitted, with respect, that it would be in accordance with the principle of *Woolmington* to hold that the ultimate burden of proof lies on the Crown.

Though the Lord Chief Justice described the offence of dangerous driving as one of absolute prohibition, it is submitted that the *ratio decidendi* goes no further than to hold that it can be committed by gross negligence. In a true offence of absolute prohibition it is no defence even to show that the accused exercised all reasonable care: *cf.* R. M. Jackson, " Absolute Prohibition in Statutory Offences " (1926) 6 *Cambridge Law Journal* 83, 87. In the present case Lord Goddard found that the accused's " own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention." Falling asleep at the wheel is negligent, for " If a driver finds that he is getting sleepy, he must stop." Pearson J. said that in the case of a man who drives, knowing that he is liable to have an epileptic fit, " The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him." This, too, seems to suggest a requirement of negligence. *Cf.* also Glanville Williams, *The Criminal Law; The General Part,* § 30: " Clearly, however, some requirement of fault must be implied; to distinguish it [*sc.* dangerous driving] from the summary offence of careless driving, there must be a higher degree of negligence than in a civil action."

There is little authority on automatism as a defence; but it is submitted that, when made out, it should be a defence even to offences of absolute prohibition, because the *act* is not, in law, imputable to the accused. *Cf.* Glanville Williams, *op. cit.*, § 5, and R. M. Jackson, *op. cit.*, 91.

Acts and Orders *

Armed Forces

ARMY ACT, 1955 (CONTINUATION) ORDER, 1957 (S.I. No. 2221); AIR FORCE ACT, 1955 (CONTINUATION) ORDER, 1957 (S.I. No. 2222): both operative December 31, 1957. The Army Act and the Air Force Act, which would expire on December 31 unless continued annually by an Order in Council, are both continued for a further period of twelve months.

NAVAL COURTS-MARTIAL (PROCEDURE) ORDER, 1957 (S.I. No. 2225): operative on a day to be appointed, which shall be the date appointed for the coming into force of the Naval Discipline Act, 1957 (5 & 6 Eliz. 2, c. 53; [1957] Crim.L.R. 691, and see also [1957] Crim.L.R. 669–671). This Order approves General Orders of the Admiralty under section 58 of the Naval Discipline Act, 1957, superseding the General Orders approved by the Naval Courts-Martial (Procedure) Order, 1953 (S.I. 1953, No. 594), and re-enacting their provisions with certain amendments. Most of the amendments are consequential on changes brought about by the new statute, but minor changes and drafting amendments have also been made.

Of particular general interest is Article 2126 (10) which makes provision for the proceedings at courts-martial to be recorded by mechanical means, as well as by shorthand. The form of oath for the person employed to record the proceedings also allows for the possibility of mechanical means being used (Articles 2140 and 2164 (1)).

Other changes of general interest are that the accused's friend is in future to be a member of the Services or of the legal profession (Article 2109); the clerk of the court is to pass on to the accused's friend any evidence of the accused's character which the prosecutor intends to produce in the event of a conviction (Article 2124 (1)); the court has been given power to deliberate in private on any matter arising out of the trial, and not merely on the finding or sentence, and the judge-advocate may retire with them except when they are considering the finding (Articles 2138 (1) and 2126 (7)); and the evidence of a sick witness unable to appear is now to be taken before the judge-advocate instead of before a magistrate or consul (Article 2167).

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Civil Aviation

AIR NAVIGATION (GENERAL) (THIRD AMENDMENT) REGULATIONS, 1957 (S.I. No. 2249): operative in part on January 8, 1958, and as to the remainder on May 1, 1958. The principal Regulations (S.I. 1954, No. 829; [1954] Crim.L.R. 640) are amended further by varying the provisions relative to the personnel to be carried in aircraft registered in the United Kingdom; to certain items of safety equipment to be carried in public transport flying machines so registered; to the instruction to be given to passengers in such aircraft with regard to the use of safety equipment; and to the extent to which qualification as a Service pilot may qualify a person for exemption from the requirements pertaining to the grant or extension of a civil pilot's licence. They also impose a new requirement that the personnel of public transport aircraft registered in the United Kingdom shall include, when the aircraft is carrying twenty or more passengers, a steward or stewardess to perform duties in the interest of the safety of passengers.

For penalties for contraventions, see Article 67 of the Air Navigation Order, 1954 (S.I. 1954, No. 829).

Customs and Excise

ANTI-DUMPING (NO. 1) ORDER, 1958 (S.I. No. 2): operative January 7, 1958. A customs duty of 4s. per lb. is imposed on polymethylsiloxane fluids (commonly known as silicone fluids) originating in France, being products of the Société des Usines Chimiques Rhône-Poulenc, to discourage the dumping of these goods in the United Kingdom.

London

The following Orders have been made detailing prescribed routes: S.I. Nos. 13 (Ealing); 14 (Egham); 15 (Richmond); 76 (Hendon).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

42. *Section* 4, *Vagrancy Act,* 1824 (*Suspected Person*)

At 11.45 p.m. a uniformed patrol constable saw a man approach a parked motor-car in the street and "try" the front and rear nearside door handles. Both doors were locked and he then made his way to a private car park, which is about twenty-five yards away, in the same street, and "tried" the padlock securing the double wooden gates. He examined the lock and pushed the gates, but they did not open. This car park is adjacent to the footpath and is an enclosed piece of land, surrounded by three walls, approximately eight feet high and a metal fencing, into which the double wooden gates are set.

The man then walked back to the car referred to above and "tried" the front and rear offside doors, which were locked. As the police officer moved to a better position, the man disappeared from his view. Approximately four minutes later the officer saw the man jump from one of the walls surrounding the private car park and run off. He was caught after a chase and when interviewed admitted that he had hoped to find cigarettes or money in the vehicles. He also admitted that whilst in the car park, and out of the view of the officer, he had "tried" the door handles of two further vehicles, with the same intention.

The whole incident took place within five minutes. I am of the opinion that this man could have been arrested and charged with "Being a suspected person loitering with intent to commit felony, contrary to section 4 of the Vagrancy Act, 1824. I appreciate the ruling in *Ledwith* v. *Roberts* [1936] 3 All E.R. 570, but again, in *Pyburn* v. *Hudson* [1950] 1 All E.R. 1006, the Lord Chief Justice implied that the length of time separating the two acts is not material, provided that there are two complete and distinct occasions.

I seek your opinion as to whether, (1) You consider that there were two distinct occasions on the facts stated to bring the man within the category of a suspected person? (2) If the answer to (1) above is Yes, whether you consider that the arrest and charge would still be justified had the man denied trying the doors of the locked vehicles in the car park, having regard to the fact that the officer did not witness his acts in the car park? [A. H. A. M.]

ANSWER

This is very much a borderline case, but in my view the man in question could have been arrested and charged as a suspected person under the provisions of section 4 of the Vagrancy Act, 1824.

In *Ledwith* v. *Roberts* [1936] 3 All E.R. 570 the Court of Appeal appeared to lay down the principle that a " suspected person " means some person who has become suspect because of his conduct on an entirely different occasion, *i.e.*, someone who had previous convictions recorded against him or who has been observed acting in a suspicious manner on some previous occasion on another day. But in *Pyburn* v. *Hudson* [1950] 1 All E.R. 1006 Goddard L.C.J., supported by the other members of the Divisional Court, made it clear that the principle laid down in *Ledwith* v. *Roberts* does not go as far as it might appear to go. A " suspected person " does indeed mean a person who has become suspect because of his conduct at some time antecedent to the act which leads to his arrest, but that previous conduct may relate to acts done an hour, a quarter of an hour or even five minutes earlier. Each case must be decided on its merits, and it is a pure question of fact to determine whether or not a cause of conduct consists of one occasion or of two separated occasions.

In my opinion the facts here set out constitute two separate occasions within the meaning of the interpretation given by Lord Goddard C.J. The first occasion related to the man's attempts to enter the vehicle and the enclosed car park; and the second occasion was some five minutes later when the man was seen jumping from the wall of the enclosed car park. But the case is clearly very much on the borderline and justices might well reach the conclusion, on these facts, that the whole incident really only amounted to one and the same occasion.

In answer to the second part of the question, I think it is irrelevant whether or not the man admitted trying the doors of the locked vehicles within the enclosed car park. The fact of his having tried to gain entrance by the padlocked gate and later, having failed to gain access, having scaled the wall, would in my view be sufficient evidence on which to charge him. Section 15 of the Prevention of Crimes Act, 1871, expressly enacts that in proving the "intent to commit felony" it shall not be necessary to show that the person suspected was guilty of any particular act tending to show his purpose or intent, and that he may be convicted if, from the circumstances of the case, and from his known character as proved to the justices (*i.e.*, in this case from his earlier trying of the doors of vehicles) it appears that his intent was to commit felony. [M. D.]

Letters to the Editor

Statutory Powers of Arrest without Warrant: Constables

Sir,

I read with interest and profit the valuable article contributed by Dr. Glanville Williams to the February issue, but noted with some surprise his comment at p. 74 on the powers of constables "given to some persons who are not regular constables." Dr. Williams says that "some servants of the Railway Executive (formerly the railway companies) are made special constables." I hasten to point out that the Railway Executive ceased to exist on September 30, 1953 (S.R.O. 1291) and the members of the British Transport Commission Police whose duty it is to preserve law and order and prevent and detect crime on the railways and other undertakings of the Commission are not just servants of the Commission made special constables on a sort of part-time basis. The early railway constables were appointed under the Special Constables Act, 1831, and from 1835 onwards under the private Acts of various railway companies, in some of which it is true the term special constables was used, but police forces specialising in these duties were organised on the lines of other police forces a hundred years ago. At least one of the Chiefs of the Railway Police became Commissioner of Police for the Metropolis.

The Railway Police Forces and their successors, the unified British Transport Commission Police were, and are, composed of men recruited and trained as police officers and they enter the police service of the Commission as a career. They are exclusively engaged on police duties. They are carefully selected and are appointed by the Justices, by virtue of the British Transport Commission Act, 1949, "to act as constables, *in, on, and in the vicinity of the whole of* the railways, harbours, docks, inland waterways, stations, wharves, garages, hotels, works, depots and other premises belonging to, leased to or worked by the Commission" and on appointment have "all the powers, protection and privileges of a constable in respect of the exercise of his duties and may follow and arrest any person who has committed in, on, or in the vicinity of such railways, harbours, docks, inland waterways, stations, etc., any offence for which he might have been arrested while in, on, or in the vicinity of the same." They also have, as a matter of interest, wide powers of search comparable to those given to the Metropolitan Police. In common with all full-time serving members of the Metropolitan Police and other police forces, the members of the B.T.C. Police can qualify for the Police Long Service and Good Conduct Medal and other relevant awards and are trained for their professional work on precisely the same lines as the officers of all other forces.

In 1957 the B.T.C. Police initiated 24,283 prosecutions of which 5,628 were for indictable offences, and every year they make a handsome contribution to the official criminal statistics relating to detected crime. Individually, and jointly with their good friends in other forces, they have to deal at some time or other with practically every crime in the calendar. It would be unfortunate if your readers were given the impression that the members of the B.T.C. Police were special constables in the sense in which that term is usually understood. I may say that many of the millions who use the railways, ports and other undertakings of the Commission are often not aware that the police officers to whom they are speaking or to whom they have appealed for assistance are members of an independent force with a wider jurisdiction than any other force in the country. They tend to assume, for example, that the uniformed officer they see on a large railway station or docks is a member of the local force who has just dropped in to have a look round.

Visitors from abroad are sometimes reported as saying that the British police are wonderful and it is worthy of note that the first policeman they see when they land at Dover, Folkestone, Newhaven, Southampton, or many other ports, is a constable of the B.T.C. Police.

I hope I have not laboured the point unduly, but I write as one who has spent the whole of his working life in the B.T.C. Police having joined the Force after I graduated at Oxford University. In common with my fellow officers I took a solemn oath to serve the Crown in the office of *Constable* and to serve the Commission at the same time—an interesting dual responsibility and certainly not one to be lightly undertaken by " some servants of the railway made special constables."

Yours faithfully,
W. O. GAY,
Chief of Police.

British Transport Commission Police,
York.

Books and Periodicals

Reviews:

Procédure Pénale. By André Vitu, *Professeur à la Faculté de Droit de Nancy.* 1957. Presses Universitaires de France. viii and 508 pp. 1,400 French Francs.

This excellent book is a new volume in the series of students' textbooks named "Thémis," though it is entirely self-contained. The series has been called into being by the recent changes in the teaching of law in French Universities when the course was extended from three to four years; it has attained and is maintaining a very high level of quality.

One of the consequences of the new curriculum is that for the first time penal procedure has become a separate subject of study for the ordinary undergraduate law student in France. Previously it had been part of the "general" course on what was normally called "Droit criminel"—which in contrast to the course on Droit Pénal Spécial (dealing with the precise definition of particular crimes) was concerned with the general principles of criminal liability and punishment as well as of criminal procedure and thus developed into a somewhat amorphous holdall. The happy result of the separation has been to produce not only the present book by Professor Vitu but also an impressive "general" volume in the same series by Professors Vouin and Léauté entitled *Droit Pénal et Criminologie,* which itself marks a great step forward in the modern exposition of the field of criminal law and allied sciences. I have not yet seen the third criminal law book of the series by Professor Merle on *Droit pénal complémentaire.*

Professor Vitu follows the practice of the series in periodically inserting into his text passages in smaller type, which give comprehensive bibliographical and case references, discuss difficult points, and review the history of a question. These small-type insertions add to the value of his work. But its greatest utility is that it provides, in a comparatively short compass, a clear and accurate account of French criminal procedure and an intelligent and enlightening survey of its characteristics. It is in the best tradition of French expository legal writing and is a good example of that difficult and attractive art. It also gives much additional information—for example on the organisation of the police—and is up to date: for example it notes the effect of the bill now before the French Parliament on the reform of procedure.* It will admirably fulfil its prime purpose as a textbook for French law students; but such textbooks, when they attain a sufficiently high standard of performance, are also the best means which a comparative lawyer can use to acquaint himself with a foreign system of law. It is for its great utility to such lawyers that I venture specially to commend this book here.

Professor Vitu is still a relatively young man. He was, and is, a person of outstanding promise; and with this book he may fairly be said to have passed out of the field of promise into that of achievement.

C. J. Hamson.

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* Since this review was written the Bill has become law. The new Book I of the Code de Procédure Penale comes into effect on April 8, 1958.

The Medical Murderer. By Rupert Furneaux. London: Elek Books. 1957. 159 pp. (16s. net.)

By detailing the mistakes which have betrayed even the craftiest of doctors' crimes—inability to dispose of the body, too great a speed in the enjoyment of the illgotten gains, usually women, which establishes a motive, etc.—Mr. Furneaux has devised a set of negative commandments which, if followed faithfully by any doctor, should lead to the perfect murder. Otherwise there is nothing new in this collection of famous crimes presented unashamedly as anti-abolitionist propaganda and written in a rather immature style.

J. D.

My Strangest Case. Edited by Kurt Singer. London. W. H. Allen. 1957. 207 pp. (13s. 6d. net.)

Famous American Crimes. By David Rowan. London. Frederick Muller, Ltd. 1957. 204 pp. (16s. net.)

Villainy Unlimited. By Derick Goodman. London. Elek Books. 1957. 234 pp. (18s. net.)

Here are three more books for the collector of crime stories. The first of these, *My Strangest Case*, is another selection of cases reported by the various senior police officers who investigated them. Of these stories, the most intriguing by far is "The Man Who Could Read Thoughts," as told by ex-Police Chief Mike Gier of Canada. The stories are, almost without exception, very strange, and might well have formed part of one of the late Miss Sayers' collections of stories of fictional detection and mystery.

Famous American Crimes is, by comparison, a rather commonplace collection. Many of the cases are of sufficiently recent date for their facts to be already well known to the general public. The style is consciously dramatic; this does not, however, detract from the more interesting cases, notably those which Mr. Rowan has called "The Boy Wonder" and "Six Seconds to Death." Of the latter case, it seems appropriate to note that some months ago it was reported that a murderer going to the electric chair on another charge confessed to a crime which fitted the details of the murder of Mrs. Sheppard as related by her husband.

The third book, *Villainy Unlimited*, is concerned with the French underworld. It covers every aspect of professional crime in France and makes interesting reading, if you can cope with a racy, Cheyney-like, style.

A. L. N.

The Newgate Noose. By Howard Culpin. London: Frederick Muller. 1957. 176 pp. (16s. net.)

This book takes the form of a collection of the more notorious and violent crimes committed in the eighteenth century by highwaymen, pickpockets, confessed murderers, women of the street, the down-trodden poor and corrupt officials. The style is racy and the number of crimes which has been selected leaves no room for details of either event or character.

J. D.

The English Prison Hulks. By W. Branch Johnson. London: Christopher Johnson Ltd. 1957. 215 pp. (including index). (18s.)

In this book Mr. Johnson gives an account of the conditions aboard those ships which ended their days as floating prisons. Imprisonment aboard these hulks was originally only a temporary expedient to house prisoners awaiting transportation with which the prisons were overflowing towards the end of the eighteenth century. However, prison hulks remained a part of the English penal system until the year 1857, when the last ship was destroyed by fire in Woolwich Arsenal. Overcrowding and lack of sanitation made conditions in the ships almost unbearable, and Mr. Johnson records the various efforts made to reform them, which were met with great opposition from the authorities.

The whole subject is treated in an almost documentary fashion, which tends to make the book a difficult one to read with any real enjoyment. Any other treatment of such a subject is perhaps impossible, which would suggest that it would have been better to deal with it in a pamphlet rather than in a full-length book.

D. E. W.

The Law of Awol. By Alfred Alvins. New York: Oceana Publications, N.Y.3. 1957. 282 and (index) 5 pp.

This book examines, in considerable detail, the law relating to the military offence of being absent without leave, AWOL being the American term for this offence. The offence is examined from the viewpoints of prosecution and defence. The author does not confine his attentions solely to the American law on the subject, but considers a number of English and Commonwealth cases as well as the writings of both English and American lawyers.

A. L. N.

Books Received:

The Criminal Area. By Terence Morris. London. Routledge & Kegan Paul, Ltd. 1958. 199 and (index) 2 pp. (25s. net.)

The Diamond Smugglers. By Ian Fleming. London. Jonathan Cape. 1957. 160 pp. (12s. 6d. net.)

The Advocate's Devil. By C. P. Harvey, Q.C. London. Stevens & Sons, Ltd. 1958. 166 pp. (12s. 6d. net.)

The Hamlyn Lectures: The Proof of Guilt. Second edition by Glanville Williams, LL.D. London. Stevens & Sons, Ltd. 1958. 326 pp. (20s. net.)

Not Guilty. By Judge Jerome Frank. London. Gollancz & Co. 1958. 249 pp. (18s. net.)

The Sanctity of Life and the Criminal Law. By Glanville Williams, LL.D. London. Faber and Faber, Ltd. 1958. 312 and (index) 5 pp. (30s. net.)

Casebook of the Curious and True. By Francis X. Busch. London. Areo Publications, Ltd. 1958. 228 pp. (30s. net.)

Murder Parade. By Judge Gerald Sparrow. London. Robert Hale, Ltd. 1958. 188 and (index) 2 pp. (16s. net.)

The Danish Criminal Code. Translated by Else Giersing and M. Grünhut, M.A. Copenhagen. G. E. C. Gad. 1958.

Pagripelse og varetektsfengsel (Arrest and detention before trial). By Anders Bratholm. Oslo. Oslo University Press. 1958.

Prawo Karne Wojskowe Wielkiej Brytanii (*Zarys*) (The Penal Military Law in Great Britain). By Julian Polan-Haraschin. Krakow. Wydan Nictwo Ministerwa Obrony Narodowej. 1956.

Readers' Digest:

Indictable offences. Summary trial: "having begun to try": 122 *Justice of the Peace* 38.

Larceny: The "Taking" in larceny: 108 *Law Journal* 40.

Probation: 8 *The British Journal of Delinquency* 161 *et seq.*

THE
CRIMINAL LAW REVIEW

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Editorial

Police dogs

There have been many complaints about the behaviour of the police during the recent demonstrations in Downing Street on nuclear disarmament. The principal cause for concern appears to have been the " use " of dogs in controlling the demonstrators. Mr. Butler, the Home Secretary, in reply to Questions in the House of Commons, has denied that there was any intention to " use " the dogs. What happened, we are told, is that the police on duty in Downing Street called for reinforcements and among those who received the call were two dog-handlers with their charges. On arrival in Downing Street they were directed to one side and were sent away as soon as was possible.

Whatever the merits of using dogs to control crowds, and it seems to be generally agreed that they provoke, rather than calm, demonstrators, police dogs are proving invaluable in checking hooliganism. As the Chief Constable of Nottingham remarked, when discussing the use of dogs in breaking up gangs of " Teddy boys," " velvet collars and dog collars do not seem to mix very well." At present there are between 500 and 600 police dogs in use in England and Wales and most forces intend to add to their numbers. Public reaction has, in general, been favourable, and provided the use of the dogs is confined to its proper sphere of controlling hooligans and not peaceable demonstrations, it will probably continue to be so. The dangers of using even a properly trained dog in situations where persons are likely to become excited are, it is submitted, adequately demonstrated by the case of *Plunkett* v. *Matchell*, *post*, p. 252.

Causes of crime

In an interview on television on March 16, Sir John Nott-Bower, the Commissioner of the Metropolitan Police, speaking of the increase in crime since 1955, said that he thought that not only television, but also the Press, cinemas and all forms of publicity seemed to concentrate a great deal of attention on crime and violence. He could not help but think that this has a bad effect, " particularly upon young, impressionable minds."

In the same interview the Commissioner spoke of the multiplicity of statutory offences, particularly traffic offences, which brought many " otherwise perfectly respectable " people into conflict with the law. He thought that this had the effect of impairing the good relations between the police and the public, which is an important factor in the efficiency of our police system.

A third topic mentioned by Sir John Nott-Bower was the publication of the Wolfenden Report. Apparently, many prostitutes had assumed at first that the recommendations were already law, and for a few days disappeared almost entirely from the streets. However, as soon as they realised that this was not the case, they reappeared, and no further diminution in offences has occurred. In fact, there were more arrests for prostitution in 1957 than had been recorded any previous year, and the figures for the last quarter of the year showed an increase over those for the previous quarter.

O tempora ! O mores !

It was with this quotation from Cicero that Mr. C. D. L. Clark ended his account of the *Montesi* case in our last issue. It was no less appropriate to the most recent news from the Italian criminal courts, which recalls the medieval and Tudor struggles between Church and State in England. The Bishop of Prato was found guilty of criminal slander, a suspended fine of 40,000 lire was imposed and he was ordered to pay damages and costs. The action arose from the reading out in church of a pastoral letter from the bishop in which he condemned as " public sinners " one Signor Bellandi and his wife, because they contented themselves with a civil marriage, a state described by the bishop as " scandalous concubinage," and refused to be married by the Church. The case was very fully argued and much was made by the defence of the necessity of not confusing civil and religious morality.

The bishop did not appear in court as he considered that his presence might be taken as an admission of the court's right to hear a matter which came within his own spiritual jurisdiction. Nothing withstanding, the court convicted the bishop of slander in accordance with their civil duty. Thereupon a most curious state of affairs ensued. The Archdiocese of Bologna was ordered to go into mourning until Palm Sunday and to sound a funeral peal for five minutes daily. The Pope has cancelled the celebration of the nineteenth anniversary of his coronation, the action of the court has been referred to as an " act of sacrilege " and it has been suggested that those involved may have incurred the penalty of excommunication, although as yet no decree has been made. The Communist press, however, has greeted the decision of the court as a " victory for modern Italy," and there seems to be little hope of any immediate resumption of a comfortable relationship between Church and State. Meanwhile, the bishop's counsel have appealed against the conviction (under Italian procedure, counsel may appeal without their clients' consent, provided that the client concerned does not object).

The Wolfenden Report

The Institute for the Study and Treatment of Delinquency has arranged two weekend conferences during 1958 on the subject of the Wolfenden Report. The first of these, on Prostitution, will take place from April 18 to April 20 at the Bracklesham Bay Hotel, Sussex. Details can be obtained from Miss Eve Saville, Deputy General Secretary, I.S.T.D., 8, Bourdon Street, Davies Street, London, W.1. The second conference, on homosexuality, for which full details have not yet been made available, will take place at Harrogate from November 7 to November 9.

The art of cross-examination: One question too many

A correspondent has reported the following extract from a cross-examination. Defence counsel to female witness (defence of provocation).

Q. You called my client a bastard, did you not?
A. No.
Q. You do use bad language at times?
A. I can. But I did not call him a bastard.
Q. Are you sure?
A. I am.
Q. I put it to you that you called my client a bastard.
A. I did not. . . . Because . . . I have two of my own.
(Floods of tears.)

Parliament

Prisoners (Local Employment)

The Home Secretary has plans for extending to other prisons the practice, successfully used at Nottingham and two other prisons, by which long-term serving prisoners with good conduct are permitted to work in local factories, visit friends, and wear ordinary clothing, thus making them accustomed to ordinary civilian life and thereby making it easier for them to resume it when ultimately released (H.C. Debates, Vol. 582, col. *170*, February 20, 1958).

Judicial appointments

Maxwell Joseph Hall Turner, Esq., has been appointed Recorder of the Borough of Hastings.

Harry Vincent Lloyd-Jones, Esq., Q.C., has been appointed Recorder of the City of Cardiff.

John Gardiner Sumner Hobson, Esq., O.B.E., T.D., Q.C., has been appointed Recorder of the Borough of Northampton.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Appreciation of Colour

By Wilson R. Harrison, m.sc., ph.d.,

Director of the Home Office Forensic Science Laboratory, Cardiff

"Beauty," it is said, "lies in the eye of the beholder." Whilst there might be some difficulty in establishing the truth or otherwise of this statement, there is no doubt that the colour of an object is a function, not only of "the eye of the beholder," but also of the light by which that object is viewed. It comes as a surprise to many to discover that the colour of an object is not something fixed and invariable like its size, shape and weight but is capable of an incredibly wide range of variation.

This fact is of more than academic importance, for ignorance or failure to take it into consideration is at the root of some of the conflicting evidence given by witnesses speaking in good faith during litigation, especially that resulting from road accidents or cases of assault where the colour of vehicles or of garments may play a vital part in questions of identity.

It is not so long ago that the great majority of road vehicles were finished in colours which came within the range favoured by the late Henry Ford—"Any colour, provided it is some shade of black"—and street lighting was either by gas, the tungsten filament lamp or the electric arc. As will be shown below, with such lighting systems, witnesses experienced little difficulty in making fairly accurate assessments of the colour of garments or of the comparatively few coloured road vehicles involved in accidents.

Today, the position is very different; a black finish for a motor-vehicle is no longer regarded as standard, and colours and combinations of colours undreamed of by a former generation of motorists have been made available by the manufacturers of cellulose and other coating materials. One firm includes in its current list no less than seventy-three different colours apart from black and white and a number of shades of grey.

In some ways, this enterprise is to be applauded. When, a generation ago, a car was involved in an accident it could often be identified by its general appearance, but this is not so readily accomplished today. Where, in the past, there were on the roads many different makes of car, each easily identifiable by its own distinctive style of bodywork, there are now far fewer makes and the great majority of cars, irrespective of make, conform closely to a standard outline. Were it not for the fact that there is a wide range of colours in use, many cars glimpsed for but a brief interval would be completely unidentifiable.

Unfortunately, the advent of the highly coloured motor-car has been attended by the steady replacement of the older systems of street lighting, with their low intensity but fairly correct colour-rendering, by the more intense and far more economical discharge lamps, few of which make any pretence toward even approximately correct colour-rendering.

To illustrate how dependent upon circumstances may be the impressions of honest, sober witnesses concerning colour, consider the case of a motor-car finished in what is known in the trade as "duotone" so that about one-half is painted a cherry red and the remainder a vivid yellow. This striking object seen by modern systems of street lighting could truthfully be described by one witness as being grey all over, by another as dove-grey and yellow, by a third as black and white, and by a fourth as brown and yellow-green. To appreciate how this can come about, it is necessary to consider in some detail the nature of light and the mechanism of colour appreciation by the human eye. This will not be easy; the investigation of the mechanism of colour vision is still incomplete and, while there is a measure of agreement on general principles, there are still conflicting theories on many aspects of the problem. That our views are, in general, correct is proved by the existence of a number of different practical schemes of colour photography which have all been based on our knowledge of the way the eye perceives colour.

As the perception of colour is bound up with the nature of light, it will first be necessary to consider what light consists of—a problem which has exercised the mind of man from the earliest times. It is only comparatively recently that it has been established that light is closely akin to gamma-rays, X-rays, heat rays and radio waves, all of which are different manifestations of electro-magnetic radiation which is propagated at a fantastically high speed as a combination of oscillating electric and magnetic forces. All these forms of radiation are propagated at the same speed but differ profoundly in their frequency of oscillation.

The radiation with the highest frequency of oscillation is familiar to us as the deadly gamma-rays which are emitted from radium, atomic piles and atomic bombs. At the other end of the scale, the oscillations of the lowest frequency are harmless radio waves transmitted from long-wave commercial radio stations. The human body has no inbuilt natural mechanism for the detection of either gamma-rays or radio transmissions, hence the development of Geiger counters for the one and detector circuits for the other; but somewhere towards the middle of the frequency range, there is a very narrow band of frequencies to which an area at the back of the eye—the retina—happens to be sensitive. It is to this narrow band of frequencies of electromagnetic radiation that the term "light" has been applied.

Whilst the retina is sensitive to the whole of the band, different frequencies affect it in different ways. If, by means of a prism or other suitable device, the various frequencies to which the retina is sensitive are separated to form a spectrum, it will be found that the highest frequencies are appreciated as violet light, the colour changing through blue, blue-green, green, yellow, light red to dark red as the frequency decreases.

Many of the facts concerned with colour vision can be explained if the colour detection mechanism of the eye is regarded as consisting of three separate systems, each responding to a limited range of frequencies within the visible range. One system, sensitive mainly to the lower frequencies, gives rise to the colour sensation we call red; another system, sensitive mainly to the frequencies in the middle of the range, gives rise to the colour sensation we call green; and the third system, sensitive mainly to the higher frequencies, gives rise to the sensation we call blue.

The colour which is seen is determined by the relative intensities of stimulation of each of these three systems. If all three are stimulated to about the same extent, the colour sensation we term white is induced; if only two systems such as the red and the green are equally stimulated, the colour sensation we term yellow results.

These three colour-appreciation systems are not of equal sensitivity; the normal human eye is most sensitive to light which is yellow-green. In an appreciable proportion of the population, the colour-appreciation systems differ from those of the majority and it is among these persons that colour blindness is found. The effects of colour blindness on colour discrimination will be considered in more detail below.

What has already been said about the appreciation of colour applies only when the light is of a certain minimum intensity. When the light is very dim, it is thought that a different light-detecting mechanism in the retina comes into play. In this, no distinction can be made between light of different frequencies, so that all vision is in various tones of grey as in a monochrome photograph.

This is why " all cats are grey in the dark " ; whatever the colour of an object as seen in full daylight, once the intensity of illumination has been sufficiently reduced, any colour disappears as the colour-sensing mechanism in the eye ceases to function.

It may have been noticed that it is often possible to see faintly illuminated objects " out of the corner of one's eye " but that they are no longer visible when the eyes are turned full on them. There is good reason for this.

There is on the retina a specially sensitive region on to which any object is automatically focused when it is being critically observed. This " yellow spot " as it is sometimes called, although better equipped with colour-sensing elements than the remainder of the retina, is practically devoid of the structures which are thought to be concerned with the detection of very feeble rays of light. This means that once the attention is attracted to a dimly lit object, it is apt to disappear from sight. The best method of observation in dim light is to peer to one side of the area being searched so that anything too dim to be seen by direct vision may be recorded on a more sensitive area of the retina.

Except for objects which are self-luminous, the colour appearance of an object seen by sufficiently intense illumination depends on the relative proportions of the different frequencies in the light reflected from it into the eyes. This will depend on two factors.

The first of these is the reflection properties of the surface, the second the spectral composition of the light which is incident upon it.

Surfaces which are either perfect reflectors or perfect absorbers of light are unknown, so that every object will both reflect and absorb some of the light incident upon it. If the absorption is independent of the frequency, then the colour of the object when illuminated by white light, which contains all the visible frequencies, will be some shade of grey. A good reflector will be seen as white, whilst a very poor reflector and consequently a good absorber will appear black.

Many objects have a reflecting power which varies according to the frequency of the light, some frequencies being almost completely absorbed, whilst others are well reflected. This means that when white light is incident upon them, the light which is reflected, which is, of course, the light by which all, other than self-luminous, objects are seen, will be different in its spectral make-up ; that is, the reflected light will no longer be a balanced white but will be seen by the eye as coloured.

Most objects reflect over a wide range of frequencies, so that both their colour and brightness can be altered by changes in the make-up of the incident light. For example, a flower which appears an unpleasant mauve in dull daylight may appear purple in bright sunlight and pink by the light of a tungsten filament lamp. The explanation for these colour changes is simple.

The colouring matter in the petals has the power of reflecting both red and blue light. In dull daylight, in which an appreciable proportion of the blue light has been absorbed in its passage through the clouds, the reflected light will consist mainly of red with just sufficient blue to spoil it for many observers. In bright sunlight, which is rich in blue-violet light, sufficient blue is reflected to swamp the red and produce a rich purple. In light from the tungsten filament lamp there is very little blue-violet light and little other than red is reflected.

Most conventional light sources provide a fairly wide band of frequencies. A green spotlight will probably contain a fair proportion of yellow light as well. If such a spotlight is used on a surface which is capable of reflecting nothing but yellow light, then the colour of such a surface will appear anything from yellow to brown according to the proportion of yellow in the green light. Brown is, of course, a low-intensity yellow.

To give good colour-rendering, an artificial light must include all the frequencies of the visible spectrum in fair intensity so that it resembles daylight in its composition. The reason is obvious: the colour appearance of an object by daylight is generally regarded as being its natural colour, and although daylight is somewhat variable in its spectral composition, the predominantly blue light of high noon being appreciably different from the reddish light of the autumn afternoon, the eye is so adjustable that the effect of such changes, for the most part, passes unnoticed.

Commercial light sources fall into two main types. In the older type, light is produced by rendering a solid incandescent by either chemical means such as combustion or by the passage of electricity through a resistance. In the more modern systems, the light is produced by the fluorescence excited in a gas by the passage of electricity. This is sometimes coupled with a secondary fluorescence produced in a powder lining the tube in which the gas is confined.

In a candle or oil lamp flame the solid which is raised to incandescence in the course of the combustion consists of tiny particles of carbon; in the incandescent gas-mantle, it is a layer of rare-earth oxides. In the tungsten filament lamp, a coiled tungsten wire is heated by the passage of electricity.

The higher the temperature to which a solid is heated, the higher the frequency of the bulk of the radiations it emits. A body which is heated to about 500°C.—about five times as hot as boiling water—emits light of low frequency, we describe it as being " red hot." As the temperature is raised, the light it emits becomes gradually richer in the higher frequencies so that eventually it becomes " white hot."

It can be shown experimentally that the light emitted from a very hot body contains the whole of the visible spectrum, so that when it is split up by passage through a prism the whole of the spectrum is found to be present, although the intensity of the higher frequencies is likely to be less than that of sunlight. Such a spectrum is known as a continuous spectrum ; any coloured object viewed by light of a continuous spectrum will not appear unduly different in colour from its appearance in daylight.

The only differences easily apparent will be those stemming from the fact that artificial light produced by heating solids, whether carbon particles or tungsten wire, will be deficient in blue compared with sunlight. This will result in the tilting of colours towards the red. Red-blues will appear red but most colours such as pure yellow, green and red will be so well reproduced that the necessary automatic adjustment will be well within the power of the eye.

The production of continuous-spectrum radiation of high power is an inefficient process because of the useless heat which has to be produced and dissipated at the same time. Modern research has shown how light can be produced much more economically with little wasted heat by the passage of electricity through gases rather than by using it for heating a metal strip as in the conventional lamp. This has resulted in the development of a number of different types of discharge lamps for use in situations where a great deal of light is required at the lowest cost.

Whilst these modern lamps are of high efficiency, the light they emit has not a continuous spectrum. Take for example one of the most efficient types—the sodium lamp. If the yellow light from one of these lamps is passed through a prism, the spectrum will be found to consist of little more than a very narrow line of yellow light ; the emission is substantially monochromatic.

The effect of this is that when an object is illuminated by a sodium discharge lamp, whatever its colour in daylight, it will appear to be of some shade of yellow ranging through brown, which is low-intensity yellow, to black. No distinction can be drawn between a white and a yellow object for both will reflect nothing but yellow light.

The sodium discharge lamp has much to recommend it. It is economical, and it generates light to which the human eye is very sensitive, but its most enthusiastic supporter is unlikely to enthuse over its colour rendering, and it is its deficiencies in this respect which have led to serious criticsm of it as a suitable source of street lighting.

Another very efficient type of discharge lamp is charged with mercury vapour. This lamp yields light which has a line rather than a continuous spectrum although it emits a greater number of frequency bands than the sodium lamp. The light from the mercury lamp is rich in violet but devoid of red. Colour rendering with this lamp is poor although not nearly so bad as with the sodium lamp.

An improved type of mercury discharge lamp which emits a certain amount of red light derived from subsidiary fluorescence effects has been developed but as yet its use for street lighting is restricted.

Fluorescent lamps somewhat similar to those used for domestic purposes are coming into increasing use for street lighting. In these lamps, no attempt is made to obtain a discharge of appropriate colour. Instead, efforts are concentrated on obtaining a discharge which is both intense and rich in ultra-violet and blue light. These practically invisible frequencies are not allowed to escape from the discharge tube but are used to excite a strong fluorescence in the powders which are coated onto the inside surface of the discharge tube. By careful selection of these powders, radiation of practically any desired range of frequencies can be obtained at high efficiency.

The standard fluorescent lamp gives light which is predominantly yellow-green, colours to which the eye is most sensitive. While it is possible to modify the fluorescent powders so as to produce a light which is richer in both red and blue to give better colour rendering as the range of frequencies emitted approximates more closely to daylight, this improvement is obtained at the price of efficiency, as the eye is less sensitive to these extra frequencies. For colour-matching or even for general domestic use, this may be a reasonable price to pay, but where the maximum aid to vision at the lowest possible cost is required—an essential in any scheme of street lighting—efficiency is unlikely ever to be sacrificed for a slight improvement in colour rendering and lamps will be chosen for their efficiency in the production of yellow-green light.

The effect of the foregoing may be summarised thus: for a person of normal vision—

Type of Lighting	Spectral Peculiarities	Likely distortion of colour rendering
Very dim	Any or all frequencies present	Colour absent. Everything represented in shades of grey
Incandescent gas-mantle or tungsten filament	Rich in red, lacking in blue	Reds well rendered, greens darkened, blues and violets may become almost black
Mercury discharge	Rich in violet, devoid of red	Blues tend to become violet, reds become brown
Mercury fluorescent discharge	As mercury discharge but with added red	Blues tend to become violet, reds are darkened and tend towards brown
Sodium discharge	Yellow only	Yellows appear yellow or white, reds and greens become brown, blues and violets become black
Fluorescent tubes (daylight or warm-white)	Slight excess of violet, slight deficiency of red	Blues tend towards violet, reds tend towards orange

Defective colour vision

An appreciable proportion of the population has markedly defective colour vision, occasionally due to disease but generally congenital.

In some, the eyes are sensitive to all the frequencies in the visible spectrum but are able to distinguish only two colours in the whole of the spectrum. In others, there is inability to see light at one end of the spectrum, so that the appreciation of red or blue is lacking but colours can be distinguished in that portion of the spectrum which can be seen. In some persons, both these defects are present.

Defects in colour vision, usually described as colour blindness, are more common in men than in women. The usual defect is an inability to distinguish the parts of the spectrum in the region which gives rise to the sensation of yellow, although a fairly common defect is inability to distinguish red from green.

Colour memory

Memory for colour is bad. It is to this fact that contemporary systems of colour photography owe their commercial success. People have such poor memories for colours that a colour photograph produced some days after the original scene has disappeared from before the eyes are accepted as excellent records of what was seen. The poverty of all practical methods of colour photography as accurate reproducers of colour can only be realised when the opportunity is taken to compare the original with the colour photograph.

This means that the identification of objects solely by their colour is unlikely to be accurate. It also explains in some measure the success often achieved by defending counsel when witnesses are challenged about their recollections of the colours of garments.

With modern systems of street lighting replacing the older lights with their tolerable colour rendering, it is imperative that the statements of witnesses about colour seen by artificial light should be accepted with the greatest reserve. The type of lighting should be determined and the witness should be presented with a set of colours which he is asked to examine under similar lighting conditions.

At the laboratory directed by the author, a range of lamps similar to those for street lighting is available. A set of specimens of the various finishes available for use by the motor industry is also available. With this material, a witness can be asked to examine the coloured slips by light from the appropriate source and to select those colours which match his recollection.

This is a cumbersome proceeding, so it is intended to try the experiment of preparing colour photographs of the various specimens when lit by the different types of lamps. It is hoped that these colour transparencies can be projected on to a screen in a dark room for the inspection of the witness.

It is realised that colour memory is poor and that the best systems of colour photography are lacking in some respects, but such a scheme is almost certain to be better than merely recording the impressions of the witness of the colour he thought he saw.

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1958

Summons and Charge Headings Relating to the Road Transport Lighting Act, 1957

By A. E. Jones

Failure to carry lights (vehicles in general)

did cause/permit to be on a road during the hours of darkness a vehicle, to wit, a . . . which did not carry

(a) two lamps each showing to the front a white light visible from a reasonable distance

(b) two lamps each showing to the rear a red light visible from a reasonable distance

Contrary to sections 1 (1) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to carry front light (certain bicycles, tricycles and invalid carriages)

did cause/permit to be on a road during the hours of darkness

a bicycle not having a sidecar attached thereto

a tricycle not propelled by mechanical power

an invalid carriage

which did not carry a lamp showing to the front a white light visible from a reasonable distance

Contrary to sections 6 (*a*) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to carry rear light and reflector (certain bicycles and tricycles)

did cause/permit to be on a road during the hours of darkness

a bicycle/tricycle not propelled by mechanical power

a bicycle propelled by mechanical power and not having a sidecar attached thereto

which did not carry

a lamp showing to the rear a red light visible from a reasonable distance

an unobscured/efficient red reflector facing to the rear

Contrary to sections 6 (*b*) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to display front light (*animal drawn agricultural vehicles and implements*)

did cause/permit to be on a road during the hours of darkness an agricultural implement drawn by [a] horse[s] [*or specify any other animal*(*s*) *alleged*]

a vehicle drawn by [a] horse[s] [*or specify any other animal*(*s*) *alleged*] and used for the time being by a person engaged in agriculture for the conveyance of his agricultural produce/of articles required by him for use in agriculture

the said implement/vehicle not carrying one lamp attached to the offside of the vehicle and showing to the front a white light visible from a reasonable distance

Contrary to sections 7 (*b*) and 12 (1) of the Road Transport Lighting Act, 1957.

Lamps not properly maintained or sited

did cause/permit to be on a road during the hours of darkness a vehicle, to wit, a . . . the lamp[s] of which, carried in accordance with section 1 (1) of the Road Transport Lighting Act, 1957,

was/were not kept properly trimmed [lighted *or* in a clean (*or* efficient condition]

was/were not attached to the vehicle in the position/manner prescribed by (*specify the Regulation*) in that (*specify the breach*)

Contrary to the said section and section 12 (1) of the said Act.

Reflectors absent or ineffective

did cause/permit to be on a road during the hours of darkness a vehicle, to wit, a . . . which did not carry attached to it two unobscured/efficient red reflectors each facing to the rear

Contrary to sections 1 (2) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to provide a vehicle with lamps or reflectors required

being the person who caused/permitted a vehicle, to wit, a . . . to be on a road during the hours of darkness, did fail to provide the said vehicle with . . . lamp(s)/reflector(s) in accordance with the requirements of section . . . of the Road Transport Lighting Act, 1957, and of (*cite any Regulations applicable*)

Contrary to sections 1 (3) and 12 (1) of the said Act.

Showing a red light to the front or a white light to the rear

did cause/permit to be on a road a vehicle, to wit, a . . . which showed

a red light to the front

a light to the rear other than a red light or a white light for the purpose of reversing

Contrary to sections 2 (1) and 12 (1) of the Road Transport Lighting Act, 1957.

Showing a moving light other than a dipping headlight

did cause/permit to be on a road a vehicle, to wit, a . . . which showed a light, other than a dipping headlight, which was moved while the vehicle was in motion

Contrary to sections 3 and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to show extra front lights for load overhanging laterally

did cause/permit to be on a road during the hours of darkness a vehicle which carried a load overhanging laterally on the . . . side more than twelve inches from the centre of the outermost of the lamps showing a white light to the front on that side, the said vehicle not carrying a lamp showing to the front a white light visible from a reasonable distance in such a position that no part of the load overhung laterally more than twelve inches beyond a vertical line through the centre of the last mentioned lamp

Contrary to sections 8 (1) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to show extra rear light for load projecting to the rear

did cause/permit to be on a road during the hours of darkness a vehicle which carried a load projecting to the rear more than three and a half [*or* six] feet behind its tail lamp/red reflectors, the said vehicle not carrying a rear lamp showing to the rear a red light visible from a reasonable distance in such a position that no part of the load projected to the rear more than three and a half [*or* six] feet behind that rear lamp

Contrary to sections 8 (2) (*or* 8 (7)) and 12 (1) of the Road Transport Lighting Act, 1957.

Failure to display extra front lights on trailers projecting laterally

did cause/permit to be on a road during the hours of darkness a vehicle being drawn which [*or* on which the load carried] projected laterally on the . . . side more than twelve inches beyond the outermost of the lamps showing a white light to the front carried on that side by the vehicle by which it was drawn [*or* by a preceding vehicle which was also being drawn by the same vehicle], the said first mentioned vehicle not carrying on the said side a lamp showing to the front a white light visible from a reasonable distance in such a position that no part of the said first mentioned vehicle or its load projected laterally more than twelve inches beyond a vertical line through the centre of the last mentioned lamp

Contrary to sections 9 (1) and 12 (1) of the Road Transport Lighting Act, 1957.

Sale of reflectors not complying with prescribed conditions

did sell [*or* offer for sale] an appliance adapted for use as a reflector to be carried on a vehicle in accordance with the provisions of the Road Transport Lighting Act, 1957 [*or* of the (*cite Regulations applicable*)], not being a reflector which complied with the conditions prescribed under the said Act for the class or description of vehicles for which the appliance was adapted, in that [specify the breach of the conditions]

Contrary to section 12 (2) of the said Act.

Mistake as to Quantity in the Law of Larceny

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

The problem to be discussed in this article is when a mistake as to the quantity of things delivered will vitiate the owner's consent to pass the property in them and will render it larceny for the recipient dishonestly to appropriate the surplus quantity.

Cases where the owner's consent is vitiated

To set this problem against its legal background, it will be remembered that larceny cannot be committed where there is an effective intent (consent) by the owner to transfer the property in a thing. A taking in such circumstances may amount to the offence of obtaining by false pretences, but it is not larceny. However, there may be an intent to pass the property which is ineffective. The intent may be frustrated by the rules of the civil law, and in that event the recipient is capable of committing larceny. This may occur in at least three cases.

(a) Where the person who intends to part with the property is a servant or agent whose authority is limited, and who acts outside the scope of his authority.

(b) Where the intent occurs in the formation of an apparent contract which is void for mistake.

(c) Where there is an intention to make a gift, or to make a transfer of (the property in) money or goods in discharge of a contractual obligation or supposed obligation to do so,[1] and some mistake is made in connection with the gift or transfer.

Cases (a) and (b) are well covered by authority, but this is not so with case (c). It seems generally true to say that in circumstances of type (c), a mistake will not prevent property passing[2]; but it seems that a mistake will have this effect in at least two cases: (i) where the mistake is as to the identity of the person to whom the delivery is made, and (ii) where the mistake is as to the identity of what is given. The principles governing mistake of identity of party are probably analogous to those for mistake in the formation of contract. There is probably a mistake of identity of a thing when there is a mistake as to any material (*i.e.*, relevant or important) intrinsic attribute of the thing. By way of illustration, one may refer to the celebrated decision in *Ashwell*,[3] the case where a sovereign was given by way of loan in mistake for a shilling. The decision turned on the question of possession, but logically a question of the owner's consent was involved also. Larceny involves two distinct elements: a taking without consent, and *animus furandi* at the time of the taking. Although in *Ashwell* the reported decision was that there was *animus furandi* at the time of the taking (because the recipient did not "take" the thing till he discovered its identity), the conviction for larceny necessarily involved a decision that the owner did not effectively consent to the passing of property. Cave J., one of the judges whose view prevailed, said that "as there was a mistake as to the identity of the coin no property passed."[4]

We now come to the problem of this article. Can it be said that in cases of type (c), that is to say where there is an intention to make a gift, or to make a transfer of money or goods in discharge of a contractual obligation to do so, the intention will be vitiated on a third contingency, namely (iii) where there is a mistake as to the quantity of the things delivered?

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[1] The obligation or supposed obligation may arise at the moment of delivery. Thus if *B* orders goods from *A*, the contract will normally be concluded by *A* acting upon the offer in delivering the goods to *B*. The goods are transferred in discharge of a contract which is concluded by the act of transfer.

[2] Thus when money is paid under a mistake of fact, the remedy is generally not an action for conversion of the specific coins paid, but an action in quasi-contract (which is not founded upon a proprietary right in what was paid).

[3] (1885) 16 Q.B.D. 190.

[4] At p. 201.

Both on principle and on authority, such mistake will have this effect, and a taking will consequently be capable of being larceny. (The authorities will be discussed later.) For example, suppose that P. owes D. £5, and counts £1 notes into his hand by way of payment. His attention being distracted, he loses count, and D. fraudulently tells him that he has counted out one less than in fact he has. By this means D. obtains six notes. It is submitted that D. can successfully be indicted for larceny of the last note counted out. P.'s consent to pass the property in this note is vitiated by mistake.

The difficulty of identifying the thing stolen

It is submitted, however, that the rule that mistake as to quantity prevents property from passing has or should logically have little practical importance in criminal law, for in most cases it is impossible to identify the particular part of the total quantity in respect of which the mistake is made.

In the foregoing example the things in question, namely the £1 notes, were told out one at a time. There, it was possible to say that consent was vitiated for the last that was transferred. This note was theoretically ascertainable, and it would not matter that at the trial of the charge no one could say which of the notes was the last counted out. At the outset it was an identifiable note, and we know that D. misappropriated it because he kept all that he was given. Contrast a case where it is impossible to identify the part of the property in respect of which consent is vitiated. P. owes D. £5, and D. takes a wad of six £1 notes out of P.'s till, in P.'s sight, fraudulently saying that he is taking the £5 that he is owed. It may be said that theoretically the property does not pass in one of the six notes, but the difficulty is that we do not know which this one is.

At least until a century ago, it was clear law that larceny could be committed only of concrete, ascertainable things. A man could not steal a patent, a copyright, or a trade mark; and he could not steal the *value* of £1. In the case of money, larceny could only be of specific money as pieces of paper or metal. When a pound note was stolen, what was stolen, in contemplation of law, was a piece of paper, not the value of a pound.

If authority is needed for this rather obvious proposition, it is supplied by *Lloyd Jones* (1838),[5] where Alderson B. ruled that a charge of embezzlement would not lie merely on proof of a deficiency in the prisoner's accounts. The reason given by the learned Baron is important: "Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen."

If it were not for the difficulty caused by some authorities to be discussed in a concluding part of this article, it could be submitted with confidence that this is still the law. When money is stolen, it is permissible to state in the indictment that such and such a sum (say, £8 16s. 10d) has been stolen; but this sum is merely a way of referring to the theft of so many pound notes, so many ten-shilling notes, so many half-crowns, pennies and so on. It is the physical money that is stolen, not the wealth represented by it. If, therefore, in the hypothetical case put above of the wad of notes, D. is indicted for the larceny of £1, it is or should be necessary to show that there is some £1 note, the property of the prosecutor, that has been taken without his consent. On the facts this is an impossible task, for it cannot be said that any particular one of the notes was taken without the prosecutor's consent. *In fact* all the notes were taken with his consent (though the consent was induced by fraud); and although a judge may wish to say that as a legal matter the consent is "vitiated" for one of the notes, he will find himself unable to pick on any one of the notes for this purpose. Therefore, unless we say that consent is vitiated for all six notes, which seems a somewhat extreme view, the defendant cannot, on principle, be convicted.

It may be emphasised that the difficulty in cases of which the last is an example is not an evidential one. Suppose that a servant girl steals a £1 note, and that when arrested she has seven £1 notes in her purse. She admits having stolen one of them, but neither she nor anyone else can identify the one of the seven notes that she stole. It is clear that she can be convicted of larceny. The fact of larceny is clear, and there is no rule that the number engraved on the stolen note should be stated in the indictment, nor that anyone should be able to say what that number is.[6] Contrast cases of the type under discussion, where the difficulty is not evidential but logical and legal. The Larceny Act defines larceny by a number of requirements, all of which clearly relate to a specific chattel. The thief must take a chattel, carry away that same chattel, without a claim of right in respect of that chattel.

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[5] 8 C. & P. 288.

[6] See Criminal Procedure Act, 1851, s. 18; Indictments Act, 1915, Sch. 1, rr. 6 (1), 9.

without the owner's consent in respect of that chattel, and so on. It is not larceny to take one chattel, to carry away another, to have no claim of right in respect of a third, and to have no consent of the owner in respect of a fourth. All the elements must apply to the same chattel, the logical identity of which must be proved throughout. It is submitted that this rule makes it impossible to convict of larceny merely because the prisoner has derived a net profit from a dishonest act, where it cannot be shown that the elements of larceny are present for a particular chattel.

The factor of claim of right

Suppose that D. deposits with P. four £1 notes, asking him to keep them for safe custody. D. sees P.'s purse lying about, and, wishing to have his money back, takes out of it four £1 notes, which he believes he recognises as his own; actually they are four belonging to P. D. then succumbs to the temptation of taking also another four £1 notes which are actually his own, though he thinks that they belong to P. and intends to steal them. D. cannot be convicted of larceny. He has made a net profit of £4, but there is no such thing as larceny of a net profit. In respect of the four notes first taken, there is a claim of right and so no *mens rea*; in respect of the next four, there is no *actus reus*. It is not open to the prosecution to say that D. is guilty of larceny because there is both *mens rea* and *actus reus* in respect of £4 in the abstract; the fact is that the *mens rea* and *actus reus* relate to different £1 notes in the concrete. The only possibility is to convict D. of an attempt to steal the notes that are in fact his.

The last illustration was not a case of mistake of quantity, but its application to such cases can readily be shown. Suppose that D., a jeweller, orders fifty wrist watches from P., an importer of watches. P.'s packing clerk by mistake sends fifty-one watches to D. D. unpacks the case containing the watches and, when he discovers the extra watch, decides to keep them all and not to mention the mistake. He accordingly puts all the watches into stock. The mistake is later discovered by P. Let us consider whether D. can be convicted of larceny.

Now it would be consistent with the facts stated if what actually happened was this. The packing clerk took a deep container, and placed the first watch at the bottom. His consent, or the consent of his master, was not vitiated as to this watch, for so far there was no mistake. Then he placed in the second watch. Again there was an effectual consent, and there was an effectual consent up to the putting in of the fiftieth watch. It was only when the fifty-first watch was placed in, at the top of the packing case, that a mistake occurred and that the consent was vitiated as to that watch. It does not seem that the mistake in respect of this watch can have a retroactive effect to vitiate the consent already validly given in respect of the first fifty.

Now let us come to the occasion on which D. received the box of watches. He took out the top watch. At that moment he did not know that there was any mistake; consequently he thought that the watch was validly delivered to him, and had a claim of right in respect of it. So also with the second to the fiftieth watch, or thereabouts. It was only when he found the extra watch at the bottom of the case that he conceived an *animus furandi*—but this is his own watch.

It is submitted that the position would not be essentially different if the packing clerk had taken at the same instant a quantity of watches, which he thought to be fifty-one though they were actually fifty, and placed them in the case together. The position would then be that, whichever watch the prosecution pointed to, they would be unable to establish that it was the watch in respect of which the owner's consent was vitiated.

Is there larceny of the whole quantity?

The conclusion from the foregoing argument is that D. is not guilty of larceny of the extra watch. Two means of escape from this conclusion suggest themselves. The first is to say that D. is guilty of larceny of the whole quantity, *viz.*, fifty-one watches, and that he may be indicted for larceny either of fifty-one or (by way of mitigation) of only one watch. In support of this it may be contended that the moment at which consent is relevant is the moment at which the box of watches is delivered to D.; that at this moment P. mistakes the quantity of the contents; that this mistake vitiates his consent as to all the contents; and consequently that it is larceny for D. to take all or any part of the contents *animo furandi*.

If this view means that D. can be convicted of larceny of fifty-one watches, it seems to be unjust. Morally he has stolen not fifty-one but one. It is contrary to justice and common sense to say that he can be convicted of stealing fifty-one. On that view, if a man were paid £1,001 instead of £1,000, and realised the mistake, he could be convicted of stealing the whole £1,001. It is true that there is now usually no special punishment for stealing to a greater rather than a less value, so that, even if such a mode of conviction were possible, the court, knowing the true facts, would award punishment on the basis of the moral truth, namely, that the accused had stolen £1. But it does not seem proper that the conviction, which may be brought up against the accused on a subsequent charge, should be for the larceny of £1,001. To allow such a form of conviction is unjustly prejudicial to the offender.

There is a certain argument the other way. If D. is owed £1 and is paid £1,001 by mistake, the facts may be such that, on the view adopted in this paper, D. cannot be convicted of larceny, because whichever note is pointed to by the prosecution, D. will be in a position to defy them to prove beyond reasonable doubt that this is not the £1 note to which he is entitled. There is an absurdity here, though speaking for myself it does not press so strongly upon me as the injustice of convicting D. in the opposite situation.

The injustice involved in saying that D. can be convicted of stealing fifty-one watches can be avoided by introducing the doctrine of claim of right. On the facts given D. is entitled under his contract to fifty watches, and therefore has a claim of right in respect of fifty [7]—presumably (it may be argued) the first fifty that he counts out; he has no claim of right to the fifty-first, and is therefore guilty of larceny of that. The weakness of this argument is its assumption that D. has a clear conscience in respect of fifty specific watches, and a guilty intent in respect of one. This seems to be a forced and unnatural construction of the facts. The watches are all alike, at least in respect of the fact that they all come within the terms of D.'s order. When D. receives them he has no way of identifying any specific watch that he has no right to take. His intention is the intention of keeping all the watches in the box without communicating to the owner the fact that they number fifty-one. This intention is not specifically rightful as to some of the watches and specifically wrongful as to another, though it is morally rightful as to an unascertained fifty fifty-firsts part of the total and morally wrongful as to an unascertained fifty-first. It is absurd to fasten on the last watch that D. takes out and to say that his intention is wrongful as to that only, for this watch is no different from the rest. This is particularly clear if D. puts all the watches back into the box without forming an *animus furandi*, and only a moment later dishonestly decides to sell the box containing the whole fifty-one watches. Here it would be very forced to say that his dishonesty is confined to the last watch that he removed from the box, at a time when he had no *animus furandi*.

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[7] Indeed, he has an actual right to fifty, not merely a claim of right. By the Sale of Goods Act, 1893, s. 30 (2), where more goods are delivered than were contracted to be sold, the buyer has a right to accept the quantity contracted to be sold.

But it is submitted that the position is just the same where he acquires the *animus furandi* immediately upon perceiving the extra watch and deals with that watch in a way different from the other fifty. The *animus furandi,* though conceived when the last watch is seen, does not relate specifically to the last watch. Even if D. has in mind some special purpose to which he wishes to put "the extra watch," it is pure chance whether he uses for this purpose the last watch that he takes out or some other watch. If he has unpacked the whole boxful and then decides to take away one of the watches for some special purpose, it is unlikely that the watch he takes will be precisely the one that he last counted out. Even if it is, it would be somewhat artificial to make a conviction for larceny depend on that fact.

The point may be put another way by saying that D. has what may be called a roving claim of right. His claim of right is not as to any specific fifty watches, but only as to fifty fifty-firsts ($\frac{50}{51}$) of the watches delivered. The burden is on the prosecution to show that there is a specific watch in respect of which the essentials of larceny are satisfied. The accused's roving claim of right prevents the prosecution from fastening upon any watch as the watch in respect of which there is no claim of right.

Larceny from a co-owner

The second argument for securing a conviction of D. for larceny of the watches is based upon section 1 (2) (iii) of the Larceny Act, 1916, which provides that the expression "owner" in the section includes any part owner. In itself this provision need only mean that a stranger can be convicted of stealing from a part owner; but it is commonly assumed that a part owner can be convicted of stealing from his co-owner. There are difficulties in this view which have not been before the courts, but one can imagine at least a possible argument that the view may be put forward in the case under discussion. It may be said that, since P. effectually consented to sell D. fifty watches, and since his consent was vitiated only in respect of one unascertained watch, D. becomes the owner of fifty fifty-firsts of the whole, while P. remains the owner of one fifty-first of the whole. D. thus commits larceny of a fifty-first part from his co-owner. This might be an attractive view but for one difficulty. The passing of property on a contract of sale of goods is now principally regulated by the Sale of Goods Act, 1893, and section 16 of this Act does not allow property to pass in unascertained goods, even the unascertained part of an ascertained whole. There is an argument that property in the unascertained part of an ascertained whole may pass in equity, but whether this argument would be adopted by the courts is now most doubtful, and in any case it seems that the point is not open before any civil court below the House of Lords.[8]

The difficulty caused by section 16 of the Sale of Goods Act does not apply where money is given, for money is not "goods" within the meaning of the Act. Suppose that P. owes D. £5, and that D. goes to P.'s house to receive payment. P. gives D. a wad of notes which he thinks to contain £5; actually, as D. knows, it contains £6. It is conceivable that D. can be regarded as part-owner of the notes in respect of a five-sixths share, and can be convicted of larceny from his co-owner.

In such circumstances, how is the indictment to be drawn? Does it aver that D. stole six one pound notes, or that he stole six one-pound notes value £1, or that he stole a one-sixth share in £6? The question of value is theoretically important on the facts supposed, for larceny in a dwelling-house to the value of £5 carries increased maximum punishment (Larceny Act, 1916, s. 13). Conceivably, however, it might be held that larceny by a trick or under a mistake on the part of the owner does not come within the meaning of larceny in a dwelling-house; certainly it is outside the mischief of the section.

The difficulty caused by section 20 (2) of the Sale of Goods Act

In a case like that put concerning the watches, there is a further difficulty in the path of the prosecution, quite apart from the difficulty of proving that the essentials of larceny are present in respect of one and the same watch. For the purpose of discussing this difficulty we shall assume that the other difficulties, already considered, do not arise. This assumption would be true if the facts of the problem are suitably adjusted, *e.g.*, if it is assumed that the extra watch was buried in straw at the bottom of the packing case, and that the accused realised that the existence of this watch in the packing case was throughout unknown to the seller. On such facts, it is possible to say that the seller did not consent to the taking of the specific watch, and that the accused did take this very same watch dishonestly. But there is still an impediment to a conviction of larceny, which is as follows. By the Sale of Goods Act, 1893, s. 20 (2), the buyer has a right, where more goods are delivered than were contracted to be sold, to accept if he wishes the whole quantity delivered, though if he chooses to do this he must pay for them at the contract rate. On a prosecution for larceny of the watch, it may be contended for the defence that this right avails even though the buyer realises that the seller probably made a mistake as to the number sent. A buyer who exercises the right, but who dishonestly fails to reveal what he has done and to pay for the goods, is guilty of a breach of contract; but a breach of contract is not in itself a crime. For the prosecution it may be said that the case is one of larceny if the buyer has from the outset the dishonest intention not to inform the seller of his mistake; but to this it may be replied that there is nothing in the Sale of Goods Act to suggest that the buyer's dishonest intention prevents him from concluding a valid contract to purchase the extra quantity by accepting it.[9] If he thus becomes the owner of the extra quantity by accepting it, he is incapable of larceny of it; an apparent larceny is in fact not a larceny because of the absence of *actus reus*.[10]

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[8] See *Re Waite* [1927] 1 Ch. 606.

What is involved here is a fundamental problem as to the nature of a contract. Can it be said that the Sale of Goods Act presupposes the existence of a contract valid by the general law, and that there can be no valid contract where one party lacks an *animus contrahendi*? If so, since the recipient lacks an *animus contrahendi* in respect of the extra watch, there can be no contract of sale in respect of it, notwithstanding the terms of the Act. It is submitted, however, that the proposition that absence of *animus contrahendi* on the one side negatives a contract is incorrect. There are certain cases in criminal law that are in favour of it,[11] but the actual decisions in these cases can be supported on other grounds, and the proposition contained in them can be regarded as resulting from an extreme "subjective" theory of contract which has since been severely modified if it has not been abrogated.[12]

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[9] By the Sale of Goods Act, s. 35, the buyer is deemed to have accepted the goods (*inter alia*) when he does any act in relation to them which is inconsistent with the ownership of the seller.

[10] Another way of putting the matter is to say that the accused has a claim of right to the extra quantity. If a man has an actual right, and knows it, he necessarily has a claim of right. It may sound strange to assert that a person who behaves dishonestly, as does the accused in the problem, has a claim of right. But it is submitted that there may be a claim of right *in rem* notwithstanding that there is dishonesty as to a duty *in personam*. To speak more plainly, there may be a claim of right to a thing although there is no claim of right not to pay for it.

[11] *e.g.*, *R.* v. *Gilbert* (1828) 1 Moo.C.C. 185; *R.* v. *Russett* [1892] 2 Q.B. 312; see the note on the latter case in Kenny, *Cases in Criminal Law*, 6th ed., 352–353.

[12] The classic statement of the modern "objective" definition of contract is Williston, "Mutual Assent in the Formation of Contracts" (1919) 14 Illinois Law Review 85, reprinted in *Selected Readings on the Law of Contracts* (New York, 1931), 119. Although there is something to be said for the view that Williston goes too far, it is clear from his argument that an unqualified subjectivist position is no longer tenable.

If P. goes through the motions of contracting with D., knowing that D. thinks that he is acting honestly, but secretly intending not to perform the contract, there is a valid contract between P. and D., which can be enforced (it is submitted) at the suit of either party. P.'s intention at the time of contracting not to perform the contract (*e.g.*, not to pay the contract price) is irrelevant to any action on the contract, just as his subsequently formed intention not to perform would be irrelevant. It is no part of the definition of contract that the parties should have intended to perform at the time of the contract; the question is whether they promised or bound themselves to perform.

The truth is that the term *animus contrahendi* is a misleading one, when used as a requirement of contract. In real life there is no such thing as an intention to contract apart from an intention to give an assurance and an intention to perform. Rogues and cheats do not advert to the question whether they desire to be legally bound by the bargains into which they purport to enter; in fact they know perfectly well that legally they are bound. Their intention relates exclusively to the giving of an assurance and to the question of performance, and the existence or non-existence of an intention to perform is irrelevant to the validity of the contract.

Another argument for denying the applicability of section 20 (2) of the Sale of Goods Act may be stated as follows. The rationale of the subsection is that where more goods are delivered than were contracted to be sold the buyer has generally the right to treat the surplus as offered to him. Where, however, the buyer knows that a mistake of quantity has been made, he has no such right, for he knows that no offer was intended. The difficulty with this argument is that it seems virtually to nullify the subsection. In nearly every case the seller will have made a mistake as to quantity, or else he would not have sent more goods than were ordered. To say that knowledge of such a mistake excludes the subsection is to exclude the subsection in all cases, except those cases (probably rare) where the seller deliberately sends more than was ordered or where the buyer appropriates the goods sent without realising that the quantity is not correct. It seems that this difficulty can be met only by distinguishing between two types of mistake of quantity: those in which the seller mistakes the quantity of goods that he in fact sends, and those in which the seller mistakes the quantity of goods that he ought to send under the contract. In the former type, the seller does not know how much he sends; in the latter he does. It may be argued that the subsection applies only to mistakes of the latter type, and that if the mistake is of the former type, and the buyer knows of the mistake, he cannot validly accept the surplus goods. If this distinction is accepted, it would remove the difficulty presented by section 20 (2) of the Act in convicting the accused in our problem of stealing the extra watch. The objection to it is, however, that it introduces rather too great a refinement into the Act. The Sale of Goods Act does not distinguish between the two kinds of mistake of quantity, and in the normal case, where the buyer is acting honestly in accepting the extra quantity, there is no reason why it should. Where the seller sends an extra quantity of the same kind as that ordered, it is generally in the interest of both parties that the buyer should have a right if he wishes to accept the whole. Although the buyer realises that a mistake has been made, he is frequently not in a position to know whether the mistake relates to the quantity sent or to the quantity that ought to have been sent, *i.e.*, the quantity ordered. (The invoice may help him to decide between these two possibilities, but that may not arrive until some time after the goods.) For the purpose of applying the subsection to an honest buyer, there is no reason for differentiating between the two kinds of mistake. It is true that our problem of the watches concerns a dishonest buyer, *i.e.*, a buyer who intends not to reveal the fact that there is an extra watch, or to pay for it; but it is submitted that the dishonesty of the buyer is an issue quite distinct from the issue whether there is an offer of the seller capable of acceptance, and it has already been suggested that the former issue is irrelevant.

(*To be concluded.*)

"*No Case to Answer*" *in the Court of Criminal Appeal*

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The submission of "no case to answer"

If, at the close of the case for the prosecution, it appears that there has been a failure to make out a case, the trial judge may withdraw the case from the jury and direct them to return a verdict of "not guilty." No case appears unless there is "such evidence, that if the jury found in favour of the party for whom it was offered, the court would not upset the verdict."[1] Counsel for the accused is under a duty to make submission to the court that the prisoner has no case to answer, in a proper case.[2] A prisoner is not, however, always represented, and it may thus be that although there is in substance no case to answer, no submission to that effect will be made.

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[1] *Parratt* v. *Blunt & Cornfoot*, 2 Cox C.C. 242.

The duty of the trial judge

The duty of a trial judge to withdraw a case from the jury differs according as to whether a submission of "no case" is made or not. If such a submission is made, then the judge *must* withdraw the case unless there is evidence to go to the jury.[3] If, however, no submission is made, the trial judge *may* withdraw the case, but he is not necessarily bound to do so.[4]

The effect of a refusal to withdraw the case where no case is disclosed

In many cases, a continuation of the hearing after the trial judge's refusal to withdraw the case will merely result in the acquittal of the prisoner. If there was no case to go to the jury, then, theoretically, the defence need adduce no evidence. Even if evidence is adduced, it will normally serve only to strengthen the case of the accused. In two situations, however, it may well be that a continuation of the hearing will prove prejudicial to the accused. Where there is doubt as to whether the prosecution has made out a case or not, or where it is deemed preferable to press for an immediate acquittal, rather than to proceed on appeal, the prisoner may elect to give evidence. In this case, cross-examination may prejudice him, by bringing to light evidence not available to the prosecution in their case, but damning to the prisoner. Also, where there is a joint indictment of two or more offenders, the defence of one may operate as an attack on the other. Should either of these two things happen, the jury may well bring in a verdict of guilty.

Appeal

Given these circumstances, several problems arise in connection with the question of appeal. What grounds of appeal are open to the accused? Will these grounds of appeal raise questions of law or otherwise? When, if at all, may regard be had to evidence adduced subsequent to the close of the case for the prosecution? In what circumstances may an appeal be allowed?

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[2] *R.* v. *White* (1918) 13 Cr.App.R. 211.

[3] *R.* v. *Leach* (1909) 2 Cr.App.R. 72.

[4] *R.* v. *George* (1908) 1 Cr.App.R. 168; *R.* v. *Jackson* (1910) 5 Cr.App.R. 22.

(a) Grounds of appeal. Generally speaking, appeal in these circumstances will take one of two forms. " No case to go to the jury " is itself a ground of appeal but suffers from the disadvantage that there may be sufficient evidence to go to the jury, thus defeating appeal on this ground, while the evidence as a whole is insufficient to support a conviction. It may thus be advisable in many cases to apply for leave to appeal on the ground that the verdict was unreasonable having regard to the evidence.

(b) Law or fact. The fact that there is no case to go to the jury may be a matter of law. Whether a verdict is unreasonable or not, having regard to the evidence, raises, however, a question of fact. Several factors have delayed the emergence of the importance of this distinction. In the first place, most appeals have proceeded, in substance, upon both grounds, *ex abundanti cautela.* Secondly, since appeals are not usually treated in much different fashion from applications for leave to appeal, the distinction has tended at times to become blurred. Thirdly, the effect of appealing on certificate (even in cases involving a point of law) on the time of commencement of sentence has operated as a complicating factor. Fourthly, reported cases do not always state clearly the grounds of appeal. That the distinction is an important one, especially in connection with the effect of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, is emphasised by *R.* v. *Abbott.*[5] In that case, the Lord Chief Justice referred to the judgment of the court, delivered by Channell J., in *R.* v. *Cohen and Bateman*[6]: " Taking section 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to show that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words ' any other ground,' so that the appeal should be allowed according as there is or is not a ' miscarriage of justice ' . . ." The effect of this decision seems to be that where appeal is taken on a point of law, and error in law on the part of the trial judge is established, the prisoner is entitled to have his appeal allowed unless the prosecution can show that the jury *must* have reached the same conclusion even had the trial judge directed rightly, whereas, if the appeal involves a question of fact, the prisoner is not entitled to have his appeal allowed unless there has been a substantial miscarriage of justice, a distinction analogous to the difference between the criminal and civil burdens of proof.

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[5] [1955] 2 Q.B. 497.

[6] (1909) 2 Cr.App.R. 197, 207.

Does, however, appeal on the ground of " no case to answer " invariably involve a question of law, or does this depend on the circumstances? In *R. v. Abbott* the Lord Chief Justice said: " Here we have a question whether or not there was a right decision in point of law by the judge. In our opinion the judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant Abbott, and therefore he was wrong in law in giving the decision he did." But it is important to remember that in *R*. v. *Abbott* there had been a submission by counsel of " no case to answer," and this had been rejected by the trial judge. Where a submission is actually made at the trial, the judge is bound to withdraw, and failure to do so is thus failure to fulfil a legal duty. The position may well be otherwise where there is not a legal duty to stop the case, but merely a discretion to do so, as is the case where no actual submission is made. It follows that if there is no legal duty, there is no breach of duty, and hence no point of law involved. Thus, the court, on appeal, is concerned with the larger question of substantial miscarriage of justice, and is not confined to the mere establishment of failure on the part of the trial judge. This fact has an obvious bearing on the next point which falls to be considered, namely, the question of the consideration by the Appeal Court of evidence received by the trial judge after the close of the case for the prosecution, for in deciding the larger question, the court may feel obliged to refer to the evidence as a whole.

The question as to whether the court can have regard to evidence received at the trial after the close of the case for the prosecution is best approached from a historical stand-point. The point first arose in *R*. v. *Pearson*,[7] in the report of which it is not clear whether there had been a submission of " no case " or not. The actual ground upon which the appeal was allowed in that decision was that the verdict of the jury was against the weight of evidence, there being grave doubts, even if all the evidence was to be believed, whether any crime was disclosed. Lord Alverstone C.J. did, however, venture the opinion, which was, of course, *obiter*, that " if the evidence for the defence supported what was wanting the court would not interfere." [8] In the same year, the case of *R*. v. *George* lent support to this proposition. Channell J. opined that " If no submission is made, and a prisoner goes on to make statements which supply evidence against him, he may be rightly convicted,"[9] whilst Phillimore J. held: "We have considered the point argued before us that there was no evidence for the prosecution, and that, accordingly, the chairman ought to have stopped the case. We do not think he was bound to do so if no submission to that effect was made to him, although he might have done so on his own initiative, and probably many judges would have done so. *And as the case went on, this court is bound to look at it as it turned out as a whole*."[10] It is important to note that there had been no submission in this case. The contrary was true in *R.* v. *Leach*[11] where a submission had been made. The appeal was allowed on the grounds that the *whole*[12] of the evidence revealed no case against the accused. The judgment of the court, delivered by Darling J.,[13] seems to suggest that the court might have regard to evidence subsequently adduced, since it operated to the advantage of the accused. There was no case at the end of the case for the prosecution, and evidence subsequently adduced merely served to affirm this finding. It was not decided in *R.* v. *Leach*, however, that evidence prejudicial to the accused could have been considered in having regard to the case as a whole.

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[7] (1908) 1 Cr.App.R. 79.

[8] At p. 79.

R. v. *Joiner*[14] was, at the time, the high-water-mark for the non-consideration of evidence received after refusal to withdraw the case from the jury, a submission having been made. The court refused to consider evidence subsequently received, Darling J.[15] saying: "We are of opinion that it was the duty of the chairman to withdraw the case from the jury, and we have no right to say otherwise, even if anything adverse to the appellant was elicited afterwards. Therefore, we take no notice as to what happened afterwards." The appeal was allowed on this ground. In *R.* v. *Jackson*, the following year, no submission having been made, the court held (*per* Bray J. at p. 25): "The point was never submitted to the judge at the close of the case for the prosecution, and therefore, as the prisoner elected to go on, we may look at the case as a whole." *R.* v. *Fraser*[16] at first sight appears damning to the view maintained in *R.* v. *Joiner*. In *R.* v. *Fraser*, a submission had been made and refused, and the prisoner had called evidence which, in the event, proved prejudicial to him. He was convicted and appealed. The court's judgment was delivered by Lord

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[9] At pp. 169–170.

[10] My italics.

[11] *Supra*.

[12] My italics.

[13] At p. 73.

[14] (1910) 4 Cr.App.R. 64.

[15] At p. 66.

[16] (1912) 7 Cr.App.R. 99.

Alverstone C.J., and in the course of it he said: "Where an objection is taken by counsel unsuccessfully and he then calls evidence, this court is not bound to disregard the effect of that evidence. . . . At present the court is not prepared to follow *Joiner*, but prefers the reasoning in the other two cases (*Pearson* and *George*)." An examination of the case, however, revealed that the court was not called upon either to follow or disapprove *Joiner*, for the appeal was dismissed, not on the strength of the evidence subsequently received, but on the ground that at the time the submission was made, there was sufficient evidence to go to the jury, that is to say, that the trial judge was right in refusing to allow the submission. This is not to deny any value to the view of the court as expressed by Lord Alverstone, but it must serve to relegate that view to its proper place, that of *obiter dicta*, as compared to the view expressed in *Joiner* which was the *ratio* of the case.

It was inevitable, the next time the point arose, that the views expressed in *R.* v. *Joiner* and *R.* v. *Fraser* should be considered, and some pronouncement made upon them. This happened in 1919 in *R.* v. *Power*,[17] a case in which, again, a submission had been made. The court came down in favour of *R.* v. *Fraser*; in the words of Darling J.[18]: "This court agrees that Lord Alverstone's statement of the law was accurate, and that the judgment in *R.* v. *Joiner* did not put the matter properly." This has been regarded as settling the law in favour of the rule laid down in *R.* v. *Fraser*, but in fact, *R.* v. *Power*, like *R.* v. *Fraser*, was *obiter* on this point; "The conviction of the appellant must be quashed on the ground that there was misdirection and non-direction." The position after the decision in *R.* v. *Power* was thus, that *R.* v. *Joiner* had laid down a rule which had been expressly disapproved *obiter* but which was not in conflict with the decisions in *R.* v. *Fraser* and *R.* v. *Power*.

Apart from *R.* v. *Hemmings*,[19] where it was stated, *per* Atkinson J.[20]: "The case should have been stopped at the close of the case for the prosecution and . . . the judge ought to have told the jury that there was no case for them to consider," the point failed to receive judicial consideration until *R.* v. *Abbott* in 1955. The appellant had been jointly indicted for forgery. At the close of the case for the prosecution, no evidence had been adduced to tend to establish which, or that both, of the accused were guilty.

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[17] [1919] 1 K.B. 572.

[18] At p. 574.

[19] (1939) 27 Cr.App.R. 46.

[20] At p. 49.

Counsel submitted that there was no case to answer, but this was rejected by the trial judge. In the course of her defence, the other accused implicated the appellant and he was convicted. *R.* v. *Power* was explained on appeal. In the opinion of Devlin J.[21]: " The whole point of the argument in *Power's* case was whether the court was bound to consider the evidence. There might well be a difference between cases where there is a doubtful point for the judge to decide, and cases where he wrongly allows a case against one prisoner to continue and another prisoner gives evidence against him. It would be wrong for the court to take that evidence into account," and later that " *R.* v. *Power* decided that the court is not bound to disregard the evidence." Lord Goddard C.J. said: " Reliance is placed by the prosecution on the decision of this court in *R.* v. *Power* for this purpose; it is said that if a judge wrongly overrules a submission of no case and allows the case to go to the jury and accused persons give evidence and one gives evidence against the other, this court is not bound to say that it will quash the conviction because it may take into account the whole of the evidence given. But *R.* v. *Power* did not decide that if there was evidence against a man who was indicted together with another person, it was right to allow the case to go to the jury against that man, or that, if there was no evidence against him, it was other than a wrong decision in law. . . . What was said was that, if the case did go to the jury, the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that the court must do so, but that this court might do so. They certainly did not say that if there was no evidence against one of two or more prisoners the judge could simply leave the case to the jury to see whether, when the case for the defence was opened, one or other of the prisoners would support the case set up by the prosecution." [22]

From a consideration of the foregoing, it appears that a distinction can be drawn between cases where there has been a submission of " no case," and cases where there has been no such submission.

Where there has been no submission, the court will have regard to evidence subsequently received. (*Jackson*, *George*, and perhaps *Pearson*). This is in accord with the principle that there is no point of law involved, for in the absence of submission, the judge has a discretion whether to withdraw the case or not. In such case, the appeal will take the substance of "verdict against the weight of evidence," regarded as a question of fact, and therefore, only a valid ground of appeal if there had been a substantial miscarriage of justice, according to the proviso of section 4 (1) of the Criminal Appeal Act, 1907.[23] In considering whether there has been a substantial miscarriage of justice, regard must be had to the case as a whole, and it is thus reasonable to consider evidence subsequently received. Where there has been a submission there are two views.

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[21] At p. 501.

[22] At pp. 506–507.

One maintains that the court may have regard to evidence received subsequently to the close of the case for the prosecution but is not bound to do so (*R.* v. *Power*, *R.* v. *Abbott* and, perhaps, *R.* v. *Hemmings*). There are, therefore, the possibilities that this discretion is unfettered and may be exercised in arbitrary fashion, and that it is a discretion which must be exercised according to certain rules. The preference of English law is well established in favour of the latter course. Can it be said that any such rules exist?

Several suggested rules emerge from the cases, but on analysis it is difficult to hold other than that some of them are not, truly, rules for the exercise of a discretion which exists where a question of law is involved, but rather that they are part of the consideration of the evidence as a whole for the purposes of determining whether there has been a substantial miscarriage of justice:—

1. The apparent rule, based on the dictum of Devlin J. in *R.* v. *Abbott* (above cited) that where there is doubt as to whether evidence adduced before the submission revealed a case to go to the jury, regard may be had to all the evidence. In this case, it is not affirmatively established that the trial judge was wrong in point of law, and the appeal takes the substance of a plea of "unreasonable verdict." This is what happened in both *R.* v. *Power* and *R.* v. *Fraser*, the verdict being found unreasonable in the former, but not so in the latter. This rule, it may be seen, does not fetter the discretion under consideration, but rather comes into operation apart from that discretion. It is not a case of deciding that there is no case, but that regard can nevertheless be had to all the evidence, but a case of looking at the evidence as a whole, because it is not clear whether there is no case or not.

2. The rule suggested by implication from *R.* v. *Abbott*, that subsequent evidence may be considered where the evidence for the prosecution has been in no way rebutted, but where it nevertheless falls short of the standard laid down in *Parratt* v. *Blunt & Cornfoot*, as opposed to the case where the prosecution's evidence falls

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[23] *R.* v. *Cohen and Bateman.*

short because of rebuttal. In *Abbott*, the Lord Chief Justice opined that "It cannot be right for a judge to leave a case to the jury where the whole of the structure upon which the prosecution has been built up to that moment collapses and falls," suggesting a distinction between completing a structure already begun, and building anew after the complete destruction of the first edifice. It would appear to be suggested that use may be made of subsequent evidence in the first case, though not in the latter. This is a distinction between no evidence (where "the whole of the structure" has collapsed) and insufficient evidence. The practical difficulties involved in such a distinction (the only case where there is really no evidence being where none is offered) tend to persuade one that when the court decides that the whole structure has not collapsed, it will, in effect, again be having regard to the evidence as a whole, for the purposes of determining substantial miscarriage of justice. In principle, of course, this is not so; and the position will thus be anomalous in that, although there was insufficient evidence and the trial judge was therefore wrong in law, nevertheless, the court may proceed as if he was not. In so far as the rule is restrictive and not permissive, it would seem to be sound, and indeed, is supported by the reasoning in *Joiner*, that subsequent evidence may not be considered where the evidence adduced by the prosecution was negligible. But in so far as it is restrictive and not permissive, it offers no help so far as defining the bounds within which resort to subsequent evidence will be permitted.

3. A third rule remains to be considered. Where a point of law is involved, the prisoner is entitled to have his appeal allowed unless the prosecution can show that the jury must have reached the same conclusion, even had the point been rightly decided. May the prosecution refer the court to evidence subsequently received in order to establish this? It seems that the answer to this question must be "No," for the effect of a right decision of this point by the trial judge is to withdraw the case from the jury, and to direct a formal verdict of not guilty. This is perhaps the reasoning behind the dictum of the Lord Chief Justice in *R.* v *Abbott*, when he decided that the question of the effect of the proviso to section 4 of the Criminal Appeal Act did not arise in that case.[24]

The effect of these considerations may therefore be summarised as follows:—

1. Where a trial judge is wrong in point of law, the Court of Criminal Appeal may refer to the whole of the evidence in order

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[24] At p. 505.

to determine whether, had the error not been made but the conduct of the case proceeded normally, the jury *must* have reached the same conclusion.

2. In one particular instance, however, this general rule cannot operate. Where the error in law was the wrongful refusal of a submission of "no case to answer," and where such error is affirmatively found by the Court of Criminal Appeal, that court may not have regard to the evidence as a whole because, on a rightful direction, no evidence after the close of the case for the prosecution would have been received.

3. To this, there may be one exception, in the case where the evidence for the prosecution, whilst falling short of the standard required, is in no way rebutted by the defence.

The second view referred to above is that expressed by the court in *R.* v. *Joiner* and not subsequently overruled. Where the trial judge was wrong in law in refusing to find "no case to answer," the court is not entitled to take into consideration evidence subsequently adduced.

Bearing in mind the actual narrow scope of the first view (as opposed to the wide application suggested by some of the *dicta* propounding it), and also, perhaps, the unsatisfactory nature of the distinction upon which that view, even so restricted, is based, may not the time be ripe for a reaffirmation of the principle in *R.* v. *Joiner*, thus ridding the law of an unwarranted nicety and an undesirable inconsistency.

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1958

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. HANCOCK, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: October 14, 1957) reduced a sentence of ten years' imprisonment to one of seven years' imprisonment where the appellant was only twenty-six years of age, though with a bad record. H. had pleaded guilty to housebreaking in 1957 and was then sentenced to ten years' imprisonment. He was granted leave to appeal by the Court of Criminal Appeal and an extension of time of two and a half years. At the time of his conviction H. was a man of twenty-three years of age, with a bad record. His record included sentences of an approved school for larceny in 1946, probation for drunkenness in 1947, approved school in 1948 for thirteen housebreakings, Borstal training in 1948 for several further housebreakings committed after escaping from the approved school, a further term of Borstal training for seventeen further offences of burglary and housebreaking, two years' imprisonment in 1951 for nine other offences, and six years' imprisonment in 1953 for sixteen housebreakings and similar offences. The present offence was committed the day after his release from prison. The court presumably took the view that, considering the appellant's age, a sentence of seven years' imprisonment was appropriate in spite of his bad record. The court gave no reasons for its decision.

In R. *v*. JACKSON, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: October 14, 1957) reduced a sentence of twelve months' imprisonment to one of nine months' imprisonment. J. had pleaded guilty at a Crown Court to unlawful wounding and assaulting a police officer. J., who was a man of twenty-one years of age, was a member of the United States air force and had previously had an excellent character. The offence was committed when J. desired a young woman to come with him and, on her refusing, he produced a spring knife. As a result the girl's thumb was cut and required stitching. The court stated that the serious aspect of the offence was the production of the knife. The court had been informed that under the American air force regulations an airman might be dishonourably discharged if he was sentenced to twelve months' imprisonment or more. Also the appellant was due to go back to the United States with his draft in January. In view of those circumstances the court would reduce the sentence to one of nine months' imprisonment, which would enable J. to be discharged in January. The court was really reducing the sentence so that J. could go back to the United States with his draft and it was to be hoped that this small reduction in sentence would not be regarded as establishing a precedent.

In R. *v.* HALL, the court (Lord Goddard C.J., Donovan and Havers JJ.: October 22, 1957) reduced a sentence of five years' imprisonment to one of three years' imprisonment. H. had pleaded guilty at quarter sessions to receiving stolen property. H., who was a man of forty-three years of age, was at the time of the offence a police sergeant in the C.I.D. He had been in the police force for about twenty-two years and had a good record. The stolen property was jewellery stolen by a ladder thief and H. had received some £46 worth out of £300 worth. The court stated that, H. being a police officer, the sentence had to be a substantial one, but considering his previous character and other matters a sentence of five years was too heavy; one of three years was appropriate.

In R. *v.* MILTON, the court (Lord Goddard C.J., Devlin and Pearson JJ.: November 25, 1957) reduced a sentence of ten years' imprisonment to one of five years' imprisonment. M. had pleaded guilty to indecent assault on a boy. M., who was a man of forty years of age, had two previous convictions. In 1945 he had been sentenced to ten years' imprisonment for offences of buggery and gross indecency (nineteen charges in all) and in 1956 he had been sentenced to twelve months' imprisonment for indecent assault on two boys. The present offence was committed when he met a number of boys on a train. On arrival at their destination he bought them some food and went with them into a park where he exposed himself to some of them, inviting them to catch hold of his person. He then put his hand up the trousers of one eleven-year-old boy. The court stated that, as this case was not so bad as many of these cases—rather in fact being a minor case—the sentence of ten years ought not to stand; five years' imprisonment was the appropriate sentence.

Preventive detention

In R. *v.* HERITAGE, the court (Lord Goddard C.J., Donovan and Diplock JJ.: October 30, 1957) reduced a sentence of ten years' preventive detention to one of seven years' preventive detention. H. had pleaded guilty to obtaining money by false pretences and had been sentenced by quarter sessions to ten years' preventive detention, the court taking 204 other offences into consideration. H., who was a man of forty years of age, had no convictions until 1949, but since that date had had four convictions which included a bind over for larceny as a bailee, eighteen months' imprisonment for obtaining money by false pretences (eight other offences being taken into consideration), eighteen months' imprisonment for stealing a caravan as a bailee, and four years' corrective training for obtaining money by false pretences (107 other offences being taken into consideration). The present series of offences arose by H., who was a photographer, offering to supply shopkeepers and similar persons with picture post-cards of local views; H. collected a deposit and never supplied the post-cards. H. began to commit these offences three months after his release from his last sentence. The court stated that this was obviously a case for preventive detention, but that ten years was too heavy for offences of this kind; seven years was appropriate.

In R. *v.* MAHER, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 2, 1957) upheld a sentence of ten years' preventive detention. M. had pleaded guilty to two offences of shoplifting. M., who was a woman of fifty-one years of age, had twenty-seven previous convictions for similar offences dating from 1924. Her last two convictions were in 1953 and 1955 when she was given twenty-one months' imprisonment and eighteen months' imprisonment respectively. As regards the present offences, M. took a dressing-gown from one store and some stockings and trousers from another. The court stated that shopkeepers were entitled to be protected from persons like M. whose record showed that no sooner was she out of prison than she committed another offence. A reduction in her sentence would simply mean that as soon as she came out of prison she would begin shoplifting again and there was, therefore, no ground for interfering with the sentence of ten years' preventive detention.

Corrective training

In R. *v.* RAVENSCROFT, the court (Lord Goddard C.J., Donovan and Havers JJ.: October 21, 1957) reduced a sentence of three years' corrective training to one of nine months' imprisonment. R. had pleaded guilty at quarter sessions to housebreaking and larceny. The offence was committed by R. breaking into the house of his father and stealing £3 15s. from the gas meter. R., who was a man of twenty-four years of age, had five previous convictions or findings of guilt, including offences of stealing a wallet, possessing an offensive weapon, stealing money from his lodgings, stealing a radiogram as a bailee and stealing a gold ring. His only previous sentence of imprisonment was one of three months imposed for the last offence in August, 1956. The court said that as R.'s longest sentence had been three months' imprisonment, three years' corrective training was too long; a sentence of nine months' was appropriate.

In R. *v.* HYLANDS, the court (Lord Goddard C.J., Gorman and Diplock JJ.: November 4, 1957) reduced a sentence of four years' corrective training to one of two years' corrective training. H. had pleaded guilty at quarter sessions to shopbreaking. H., who was a man of twenty-one years of age, had several previous convictions for which he had been sentenced to approved school, fines and Borstal training, but he had never previously served a sentence of imprisonment. The court gave no reasons for its decision.

Detention

In R. *v.* BUTLER, the court (Lord Goddard C.J., Cassels and Barry JJ.: February 3, 1958) reduced a sentence of six months' detention in a detention centre to one of three months' detention. B., who was a boy of sixteen years of age, had pleaded guilty with two other youths at quarter sessions to shopbreaking and larceny, another offence of taking away a motor-car being taken into consideration. B. was previously of good character. The principal offence was committed by breaking the window of a shop and stealing watches. Twenty-eight watches had been stolen. The court stated that under section 18 of the Criminal Justice Act, 1948, the term of detention in a detention centre was three months unless there were " special circumstances " having regard to which the court thought that three months' detention would be insufficient. In the present case, the offence was a serious one but B. was previously of good character and had been given satisfactory references by his employers. The court did not feel that there existed any special circumstances which would justify a sentence of longer than three months' detention and the sentence would be reduced accordingly.

Borstal training

In R. *v.* DICKINSON, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: October 14, 1957) varied a sentence of Borstal training to one of imprisonment for twelve months. D. had pleaded guilty at quarter sessions to robbery and to larceny and four other cases were taken into consideration. D., who was a man of twenty years of age, had been sent to an approved school in 1947 for stealing a collecting box; and in 1954 had been put on probation for two years for storebreaking and indecent assault on a female. In breach of that probation order D. had stolen £3 13s. from a coin meter in 1955 and had been sentenced to Borstal training. The present offence arose when he ran away from a Borstal institution and then came across three small boys in a field. He got 2s. from one of them for a rabbit and refused to return it when it turned out that the rabbit was maggoty. He also made the bigger boy, aged fifteen, hand over his pullover, his watch and threepence. The four other charges were stealing a pair of wellingtons and an overcoat, stealing a key and obtaining 2s. by false pretences relating to the above-mentioned rabbit. The court said that, considering D.'s age and that he had been an absconder from Borstal and certainly meant to abscond again if sent back, a sentence of twelve months' imprisonment was more appropriate.

In R. *v*. CHARTERIS AND REED, the court (Lord Goddard C.J., Gorman and Diplock JJ.: November 4, 1957) altered the sentences of Borstal training to imprisonment for three years. C. and R. had pleaded guilty at quarter sessions to burglary and housebreaking and asked for thirty-six other cases to be taken into consideration. Both C. and R. were men of twenty years of age. The offences involved some £220 in cash and £460 in property. Both C. and R. had previous convictions and had been sentenced to Borstal training, and the present offences were committed when they ran away together from a Borstal institution. The prison commissioners reported that " neither has any intention of co-operating further in Borstal " and that they could not be regarded as suitable. The court stated that C. and R. had been given chances in the past, they were both now over twenty and the court could find no reason at all for their behaviour. Having regard to the prison commissioners' report three years' imprisonment was the appropriate sentence.

Practice and Procedure

Central Criminal Court

Joinder of accused in one indictment

A, B, C and D were given permission to sleep in a billiards saloon but were locked in by the proprietor when he left for the night. The police came on the scene to see A standing below a window of the hall and the legs of another man disappearing through the window. A ran away and when arrested resisted violently. The police returned to the window and called on the men inside to come out. A, B and C in turn came out through the window and in turn assaulted separate officers. Two indictments were drawn, one against A alone and one against A, B and C charging each of them in separate counts with assaults on separate peace officers. On the clerk of the court refusing to sign the latter indictment, Streatfeild J., on February 20, 1958, held that the indictment was good within rule 3 of the Indictment Rules and directed that it be signed. R. *v*. LEE AND OTHERS, February 18, Session, 1958, C.C.C. [C. B. ORR, *Barrister-at-Law*.]

Magistrates' Courts

Warrants under section 15 *of the Magistrates' Courts Act,* 1952

In cases where the defendant to a summons for a summary offence fails to appear at the hearing, section 15 of the Magistrates' Courts Act, 1952, authorises the issue of a warrant for his arrest, provided that the information " has been substantiated on oath " and that " the summons was served on the accused within what appears to the court to be a reasonable time before the trial or adjourned trial." If the new procedure for pleading guilty *in absentia* has been carried out and the court nevertheless decides that the accused must appear to the summons, there must be an adjournment of the case before a warrant can be issued under section 15 (see section 1 (3) of the Magistrates' Courts Act, 1957). Proviso (*a*) to subsection (2) of section 15 lays down that " where the accused fails to appear at an adjourned trial, the court shall not issue a warrant under this section unless it is satisfied that he has had adequate notice of the time and place of the adjourned trial."

Should the summons in question not be lawfully served or should the court not be satisfied that the defendant has had notice of an adjournment, section 15 cannot be used. If a warrant is to be issued in either of those eventualities recourse must be had to section 1 of the Magistrates' Courts Act, 1952. This, construed literally, enables a warrant to be issued on a sworn information as an alternative to issuing a summons, but the practice of magistrates' courts has always been to regard it as authorising the issue of a warrant also after a summons has proved abortive. Any other interpretation would mean that where a summons had not been served or where a notice of adjournment had not reached the defendant no warrant could be issued until a further summons or notice of adjournment had proved effective. This would be putting a premium on the accused's ability to evade service of process; and justice would be manifestly seen not to be done in many cases.

But the reasonable and commonly adopted practice is not without its problems and anomalies. If a prosecution may start afresh under section 1 of the Magistrates' Courts Act, 1952, when a summons or a notice of adjournment has not been served, what is to prevent the same power being invoked even when service has been effected? There is no provision of the law which either authorises the first course or forbids the second. It is true that section 15 enables the court to adjourn the information when issuing a warrant under its provisions; but supposing the court declines to do this and simply refuses to deal with the case at all in the absence of the defendant? The summons and information will then be just as "dead" as if there had been a failure to effect service; if that is so the way will be open for a fresh information under section 1.

Recourse to section 1 after good service of a summons or notice of adjournment means, however, that the restrictions imposed by section 15 on the issue of a warrant are by-passed. Apart from any legal considerations this is not without its advantages in practice. It is to be observed, for instance, that nowhere in section 15 or elsewhere is it laid down how a court is to be "satisfied" that a defendant "has had adequate notice of an adjournment": doubts on the matter need not trouble magistrates if they use section 1 instead of section 15 as their warrant issuing power.

The draftsman of the Magistrates' Courts Act, 1957, clearly did not contemplate the issue of a warrant under section 1 in circumstances to which section 15 is applicable, otherwise, presumably, the ban in section 1 (3) on issuing a warrant on the first non-appearance of a defendant under the new procedure would not have been confined, as it is, to a warrant under section 15. However, as the legislature obviously intended to protect from arrest an accused person who had been led to believe that his appearance would be excused, and as it would manifestly be unfair, in such a case, to issue a warrant without warning, courts would undoubtedly be well advised to consider themselves precluded from issuing a warrant under section 1 at the first hearing of a summons to which the new procedure had been applied and been effective.

This point of wise practice does not alter the fact that the terms of section 1 are wide enough to allow it to be invoked whenever a magistrates' court desires to issue a warrant in respect of the trial of a summary offence; and it is difficult to see why it was considered necessary to insert in section 15 a special power to issue a warrant when an untried information is adjourned. At any rate, that power is not expressed to exclude the operation of section 1 in the circumstances specified; indeed, the preliminary words of section 15: "Where at the time and place appointed for the trial or adjourned trial of an information the prosecutor appears but the accused does not . . ." include the cases of an unserved summons or an ineffective notice of adjournment—in which section 1 must be relied on if the law is not to be set at naught.

The only occasion when the warrant issuing power conferred by section 15 can be of any real assistance to obtain the attendance of a defendant at the trial of a summary offence is when either the summons return date or the adjournment date is outside the time limit for proceedings. It will then be too late to start afresh with a sworn information under section 1, but the time limit does not apply when it is a question, not of laying information, but of substantiating on oath, as required by section 15, an information already laid. Even in instances of this sort section 15 only avails, of course, if the summons or notice of adjournment is effective. Consequently, if the time limit for summary proceedings is running out in a case where it is desirable that the accused should appear at the trial, the safest course is to apply for a warrant in the first instance; possible hardship to the accused can be minimised by backing the warrant for bail. Circumstances to which these considerations apply will be more frequent as a result of the 1957 legislation. The adoption of the new *ex parte* procedure will lead to more summonses being served by post—and inevitably to more summonses being deemed not to have been served because they are not acknowledged; and paragraph 3 of the Magistrates' Courts Rules, 1957, which assimilates service by hand at the defendant's place of abode to service by registered post will, also, for the same reason increase the number of ineffective summonses.

The superfluousness of the warrant authorised by section 15 is recognised in everyday practice in magistrates' courts, for warrants are commonly drawn up in the simple Form 3 of the Magistrates' Courts (Forms) Rules, 1957 (" in first instance ") instead of in the more elaborate Form 28 (" on failure to appear before evidence has been received ")—even although a summons may have been lawfully served. The validity of such a warrant seems never to have been challenged in the superior courts on that ground.

The explanation of the duplication of the warrant issuing power arising from the terms of section 15 is to be found in the Summary Jurisdiction Act, 1848. The former procedure with regard to adjournments has been elaborated in the Magistrates' Courts Act, 1952, and, at the same time, there has been a rather pointless perpetuation of one of the many redundancies to be found in the old legislation covering summary procedure.

[A. E. JONES]

Summary Justice

Assault

Assaulting a fourteen-year-old girl by lighting fireworks which she was carrying in the hip-pocket of her jeans; three months' imprisonment; Shepstone: Leeds Stipendiary Magistrates' Courts (*Manchester Guardian*, February 18).

Breach of the peace

Acting in a manner likely to cause a breach of the peace by looking over backyard walls; charged under the Justices of the Peace Act, 1361; bound over to be of good behaviour; Slater: Newton-le-Willows Magistrates' Court (*Liverpool Echo*, February 20).

Clean air

Allowing smoke to be emitted in a smokeless zone contrary to regulations made under the Clean Air Act, 1956, s. 16: fined £10; Midland Hotel (Birmingham), Ltd.: Birmingham Magistrates' Courts (*Birmingham Mail*, February 14).

Marriage

Making a false declaration for the purpose of marriage contrary to section 28 of the Criminal Justice Act, 1925; fined £25; Marriott: Birmingham Stipendiary Magistrates' Court (*Birmingham Mail,* January 31).

Road traffic

Having an insecure load on a lorry contrary to regulation 73 (2) of the Motor Vehicles (Construction and Use) Regulations, 1955; two crates containing empty beer bottles fell from the lorry and broken glass was strewn about the road; fined £5; Carr: Birkenhead Magistrates' Court (*Liverpool Echo,* February 4).

Being drunk in charge of a motor scooter contrary to section 15 of the Road Traffic Act, 1930; fined £5, ordered to pay £3 3s. costs; Clegg: Southend Magistrates' Court (*Evening Standard,* February 14).

Failing to report an accident (*i.e.,* that he had collided with a parked car) contrary to section 22 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1956, Schedule 8, para. 15; fined £10 with 5s. costs; Cowshill: Solihull Magistrates' Court (*Birmingham Mail,* February 4).

Case and Comment *

Assault—*Self-defence—Spontaneous action of trained dog*

PLUNKETT *v.* MATCHELL [1] (South-Western Magistrates' Court: January 22, 1958).

This summons for assault raised two unusual points. The facts, hotly disputed by the parties, were found by the magistrate to be as follows:

P. was a resident in a block of flats adjacent to a large building site. The contractors on the building site had employed a watchman with trained dogs to protect the area.

It was the habit of P. to trespass by walking through the site to the shops nearest to his home.

On a Sunday morning P. was stopped by the watchman (M.) and asked his business. He refused to reply, and walked on.

M. then went to an enclosed van some yards distant and returned with a trained dog under his control. Overtaking P. he insisted on a reply to his inquiry and demanded P.'s name and address, which P. refused to give.

In an excited altercation there was no violence or threat of violence on either side but P. slipped in loose earth and fell. Struggling to his feet, he was so excited and gesticulated so violently that although he had no intention of committing any violence upon M., M. genuinely believed this to be imminent. The dog was trained to protect the person of M. if he was threatened, and without any word of command sprang at P., gripping his wrist and tearing his clothing but not injuring him.

On this evidence the learned magistrate had to decide whether an assault had been committed. It was not disputed that there had been an assault if M. could not prove self-defence.

The learned magistrate accepted that M. was in fear and if he had been the complainant in the proceedings the learned magistrate would have found an *actus reus* but would have decided P. was not guilty in the absence of *mens rea*.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the prosecution: *H. N. Edwards* (instructed by Messrs. Henry Pumfrey & Son). For the defendant: *R. B. Tarling* (Messrs. R. W. Platt), Solicitor.

The learned magistrate decided that as self-defence is sufficient to establish an *actus reus,* and as P. had conducted himself in such a way as to give rise to the *actus reus,* M. had a good defence to the allegation against him, if no more force was used than necessary. It was his view, however, that as the use of the dog in this case was not for the purpose of checking a trespasser, but was, having regard to M.'s pursuit of P., exactly the same as if P. had not been a trespasser at all. What the dog did was M.'s act. He had brought the dog there for his defence should he be attacked. This was not a reasonable view of the circumstances prevailing when P. had walked away.

M. should have appreciated that P. was truculent in demeanour and should have appreciated what the dog would do, therefore he had created a situation where the dog would attack P.

In the event the learned magistrate decided that the use of the dog was more than was reasonable in the circumstances. M. was convicted and discharged absolutely.

[R. B. TARLING, *Solicitor.*]

COMMENTARY. The *actus reus* of an assault is " causing the person threatened to believe that unlawful force is about to be applied to him by the wrongdoer, *i.e.*, causing a certain state of mind in the victim." The *mens rea* is " the realisation in the mind of the wrongdoer that his conduct will produce the necessary impression on the mind of the victim." (J. W. C. Turner, " Assault at Common Law," *The Modern Approach to Criminal Law*, 344, 346, 351).

A battery is the actual application of unlawful force, and, in the present case, P. was, of course, the victim not merely of an assault but also of a battery. The term " assault " is commonly used to include both crimes. It is well established that it is a defence to a charge of assault or battery to show that the acts were done in self-defence, provided that no more force was used than was necessary. Presumably a mistaken but honest belief that such force was necessary would also be a defence, at least if the belief was a reasonable one.

The *actus reus* in the present case was, presumably, taking the dog up to P. The dog's actions thereafter were apparently held to be the natural consequences of that act in the same way as the expulsion of a bullet may be the natural consequence of the squeezing of a trigger. Was it enough, however, that M. *should have* appreciated that these consequences might follow? Should it not, in Mr. Turner's words, have been proved that there was a " realisation in the mind of the wrongdoer " that these consequences might occur? It has been suggested that negligence might found an action in tort for battery (see Street on *Torts,* 19) but the criminal law usually requires intention or negligence.

Bankruptcy. See *R.* v. *Vaccari, post,* p. 261.

Evidence—*Character—mode of life*

R. *v*. SUTCLIFFE [2] (Court of Criminal Appeal: Hilbery, Jones and Salmon JJ.: January 28, 1958) (*The Times*, January 29, 1958).

S. was convicted at quarter sessions of housebreaking and larceny. At the trial the principal evidence against S. was an admission to a police officer, which S. denied. S. was a man of bad character and did not put his character in issue. He was, however, cross-examined about his income and expenditure, as to which the summing up (*inter alia*) was: " Now let us see how the matter stands. Evidence was first given by S. You may take the view that S. was rather a curious character, curious in this way: he is a docker who has not worked for six months. He has two children and a flat, two cars including a Mercedes-Benz—not a cheap car—and he goes about in evening dress, spends his time in pubs and clubs, and does it all (according to him) on £6 a week which he draws from the National Assistance and £3 a week which he gets from his union. That is important in this way only: it would be quite wrong for the prosecution to try and adduce evidence that he was a man likely to commit crime; that is not the point of the evidence or why I am drawing attention to it. But it is perfectly right to consider his background as affecting his credibility, as to whether he is a person to be believed. Is he a solid respectable citizen, a person you can normally depend upon, or is he something very different? That is the importance of the evidence which has been given before you yesterday. Is he a person to be believed, or is he not? As I say, these are matters which cannot be common to many other dockers in this country." S. appealed to the Court of Criminal Appeal upon the main ground of misdirection in the summing-up. It was argued for S. that it could be inferred from certain passages in the summing-up that S. was a man of bad character. The passage principally relied on was that set out above.

Held, dismissing the appeal, that the question whether S. was truthful was a vital issue for the jury because the case against him largely depended upon the police evidence of his admissions. The most important passage was: " But it is perfectly right to consider his background as affecting his credibility, as to whether he is a person to be believed. Is he a solid respectable citizen, a person you can normally depend upon or is he something very different? " This passage taken alone might be said to be a strong hint to the jury that S. was a person of bad character, but the jury were warned both before and after that passage that the importance of S.'s background was in relation to his credibility. Whilst, therefore, the language used was dangerously infelicitous, having regard to the warnings that went with it and in the setting of the whole summing-up, it did not amount to a misdirection vitiating the conviction. [H. P.]

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[2] For the appellant: *D. Hollis* (instructed by Bower, Cotton & Bower for T. W. Stuchbery & Son, Windsor). For the Crown: *R. M. Talbot* (instructed by Champion & Co. for Knight & Maudsley, Maidenhead).

COMMENTARY. Evidence as to the accused's affluent mode of life could be logically relevant only (a) as tending to show that he had committed the crimes with which he was charged or (b) as tending to show that he was not to be believed on his oath. It could fulfil the former purpose only by its tendency to show that he was a man who got his living by dishonest means and was therefore more likely to have committed the offence in question. The chairman expressly said that it would be quite wrong for the prosecution to adduce evidence that he was a man likely to commit crime and this is surely correct. Presumably, therefore, he admitted the evidence to show that the accused was not to be believed, and again, such evidence could do this only by showing that he was a man who got his living by dishonest means. The Court of Criminal Appeal seems to have held that the evidence was not admissible for this purpose either. Why, then, was the evidence admissible at all?—unless it had some relevance which does not appear in the report. It has been held that evidence by a prisoner that he has been earning an honest living for a considerable time is evidence of his good character under section 1 (*f*) (ii) of the Criminal Evidence Act, 1898: *R.* v. *Baker* (1912) 7 Cr.App.R. 252. Conversely, it would seem to follow that evidence that a man gets his living by dishonest means in evidence of bad character; but such evidence is not admissible unless the accused has put his character in issue, which Sutcliffe had not.

Evidence—*Corroboration of accomplice's evidence*

R. *v*. HODGETT [3] (Court of Criminal Appeal for Northern Ireland: Lord MacDermott L.C.J., Curran L.J. and McVeigh J.: December 7, 1956; January 14, 1957) ([1957] N.I. 1).

H., the appellant, had been convicted of receiving stolen goods. B., the principal witness for the prosecution, was an accomplice who had pleaded guilty to stealing the goods. B. had given evidence of the following facts: (1) that he had sold the stolen goods to the appellant at a certain price; (2) that on several occasions he had, on H.'s direction, signed receipt cards for the goods in the fictitious name in which H. had made them out; and

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[3] For the appellant: *Jones Q.C.* (instructed by A. J. Walmsley, Esq.). For the Crown: *McCoy Q.C.* (instructed by the Chief Crown Solicitor).

(3) that when the thefts were discovered he had told H., who thereupon stated that he would destroy the records of the transactions.

On his appeal against conviction, it was contended on his behalf that the corroboration required of an accomplice's testimony must be corroboration in some material particular that remains a live issue between the Crown and the appellant after all the evidence has been heard and the case committed to the jury.

Held, (1) That independent evidence of the price paid for the goods was corroboration of B's evidence.

(2) That the presence of fictitious names in H.'s handwriting on the receipt cards could be corroboration of B.'s evidence, although it could not be corroboration of the allegation that it was H. who had told B. to sign in a fictitious name.

(3) That evidence that H.'s records covering the relevant period had been destroyed could be corroboration of B.'s evidence.

(4) That there is no authority for restricting the requisite corroboration to the part or parts of the accomplice's evidence which the defence has challenged. [D. C.]

COMMENTARY. The Court of Criminal Appeal has said that the evidence of an accomplice must be corroborated both as to a material circumstance of the crime and as to the identity of the prisoner. "It must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." *R.* v. *Baskerville* [1916] 2 K.B. 658, 667. A "material particular" is presumably a matter adduced by the prosecution which has a tendency to prove the accused's guilt. Such a particular does not, apparently, become immaterial because the accused does not deny it.

Evidence—*Indecent assault—corroboration*

R. *v.* SANDS [4] (Court of Criminal Appeal: Cassels, Streatfeild and Slade JJ.: February 10, 1958).

S. was convicted at Assizes of three offences of indecent assault on boys and one of gross indecency with another male person. S. was a schoolmaster by profession and the persons concerned in the charges were either pupils or ex-pupils of S. At the trial the person concerned in each charge gave evidence for the prosecution and, on the question of corroboration, the summing-up, *inter alia*, was: "They say that corroboration means that there is some evidence, apart from the evidence given by the person concerned in the charge against him, tending to prove the truth of the statement made by the person concerned. So what we have got to look for is to see whether there is any other evidence, in any of these cases, tending to prove the truth of the evidence of the person concerned. Now, what does that mean—' tending to prove it '? Well, one of the ways in which you give such evidence is to show that the man concerned is the sort of man who does that sort of thing. For instance, if a man is alleged, as sometimes they are alleged, to be one of these people who invite other men to commit crimes of this sort with him, and where there is evidence of paint, powder and powder puffs and so forth, that may be corroboration. So, in the same way, evidence tending to show that he has been guilty of other offences of the same character—that is corroboration in law." S. appealed to the Court of Criminal Appeal (by certificate of the trial judge) on the main ground of misdirection.

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[4] For the appellant: *F. H. Lawton Q.C., J. Gower* (instructed by Cripps, Harries, Hall & Co., Tunbridge Wells). For the Crown: *R. Mathew* (instructed by The Director of Public Prosecutions).

Held, allowing the appeal, that it was wrong for the jury to approach the consideration of a case of this type on the basis that this was the sort of man who did this sort of action. In *R.* v. *Campbell* (1956) 40 Cr.App.R. 95, Lord Goddard C.J. said: " In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B. says that he also was the victim of a similar assault, though both say it on oath." In the present case, the judge said that evidence tending to show that he had been guilty of other offences of the same character was corroboration in law, That, in the opinion of this court, concluded the matter and the convictions could not be allowed to stand.

Per Cassels J.: This court must hesitate a long time before it applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in cases of this character which, it had been frequently said, dealt with charges easy to bring and difficult to meet. It would further be wrong to apply the proviso in a case such as this where the appellant was a qualified teacher of good character whose whole career would be ruined in the event of a conviction. [H. P.]

COMMENTARY. In *R.* v. *Campbell*, after the dictum quoted above, the Lord Chief Justice went on to say: " At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story." It is not, at first sight, easy to reconcile the two sentences. The succession of cases, it appears, is not corroboration, yet it is evidence that the jury may consider, against the accused.

Evidence that the accused has done similar acts on other occasions may be relevant in one, or other, or both of two ways. (1) "The fact that he has done it several times before tends to show that he has a propensity to do it and through this tends to show (because a man who has such a propensity is *ceteris paribus* more likely to have done it on the instant occasion than one who has not) that he did in fact do it on the instant occasion." (Cowen and Carter, *Essays on the Law of Evidence*, 133.) (2) The evidence may be relevant, otherwise than through propensity, simply through the unlikelihood that three boys should tell similar stories about the conduct of the same man on different occasions and all be lying or mistaken. *Cf.* Glanville Williams, *The Proof of Guilt* (2nd ed.), 148: "Where, however, the children testify to different incidents the probability that they are speaking the truth becomes incomparably greater." Thus, in the first instance, the evidence tends to show that the accused is guilty; in the second, it tends to show that the complainant is speaking the truth.

The present case shows that the Lord Chief Justice's dictum that a succession of these cases may help the jury "to determine the truth of the matter" must at least be qualified. Such evidence is not admissible, and should not be considered by the jury, as having a direct bearing on the issue of whether the accused did the act; but it is apparently admissible on the issue of whether the witness is speaking the truth when he says the accused did the act. If it is so admissible, would it then constitute corroboration? If, as Wigmore says, the rule of corroboration requires no more than that "the corroboration must have the effect of persuading to trust the testimony" to be corroborated, then such evidence should amount to corroboration. On the other hand, it may be argued that the corroborative evidence must do more than tend to show that the principal witness is speaking the truth, and must tend to implicate the accused in a material particular, independently of the principal witness's evidence. The latter would appear to be the rule of English law. *Cf. R.* v. *Hodgett*, above, p. 255, and Cross, *Evidence*, 141.

Where it is held that special circumstances result in the similar fact evidence having a direct bearing on the issue of whether the accused committed the crime charged, the similar fact evidence will amount to corroboration: *R.* v. *Marsh* (1949) 33 Cr.App.R. 185, where evidence of a previous conviction for indecent assault *against the same child* was admitted as showing a guilty lust, and was held to be corroboration of the child's evidence.

Habeas corpus—*Detention under the Mental Deficiency Act, 1913—evidence on which order made*

Re SAGE[5] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Salmon JJ.: January 27, 1957) (*The Times*, January 28, 1957).

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[5] For the applicant: *Peter Pain* (instructed by Walter Stein & Grover). For the Medical Superintendant of Moss Side Hospital, Maghull, Liverpool: *Rodger Winn* (instructed by the Solicitor, Ministry of Health).

S. had pleaded guilty to having stolen two and a half pints of milk and had been placed on probation. During his period of probation he moved home without informing the probation officer. Being in breach of his probation order, he was brought before the court and remanded in custody for a medical report. Subsequently the doctor who examined S. reported to the court that he was "a feeble-minded person within the [Mental Deficiency] Act [1913]"; and the court made an order for S.'s detention, pursuant to section 8 of the Act. On an application for a writ of *habeas corpus*, on the ground that there had been no evidence before the justices that the applicant had suffered from a condition of incomplete or arrested development of mind which had existed before he was eighteen, and that in the absence of such evidence S. was not liable to be dealt with under the Act:—

Held, that the doctor, in reporting to the court that S. was "a feeble-minded person within the Act," was merely saying in a compendious way that he had examined the applicant and had come to the conclusion that the Act applied to him. In the opinion of the court there had, therefore, been evidence before the justices on which it was open to them to have made the order which they had in fact made.

Per curiam: (1) On an application to the court for a writ of *habeas corpus* the court inquires whether the applicant is lawfully detained: if he is detained under a lawful order the court can go behind that order if that order was made without evidence.

(2) An order made under section 8 of the Mental Deficiency Act, 1913, does not require the prior consent of a parent or guardian; *aliter* where the order is made under section 6 of the Act. [D. C.]

Probation—*Breach of—unlawful conviction by magistrates' court*

R. *v.* GREEN [6] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery, Cassels, Barry, Salmon JJ.: February 3, 1958) (*The Times*, February 4, 1958).

C. had been convicted of larceny at quarter sessions and placed on probation. Whilst on probation he committed another offence of larceny and was brought before a magistrates' court and was sent to a detention centre for two months. After serving eight days of this sentence, C. was released by the Home Secretary, presumably on the grounds that, as the minimum lawful sentence to a detention centre is three months, C. was being held under an illegal sentence. Therefore C. was brought back to the quarter sessions to be dealt with for breach of probation, and that court, purporting to act under the provisions of section 6 of the Criminal Justice Act, 1948, passed a sentence of Borstal training. C. appealed to the Court of Criminal Appeal against the sentence of Borstal training on the main ground that the unlawful conviction by the magistrates' court could not properly be regarded as a breach of probation. It was argued for the Crown that the Court of Criminal Appeal had no jurisdiction to inquire into the circumstances because there had been no conviction against which an appeal would lie and, accordingly, the only possible appeal was against the quantum of the sentence.

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[6] For the appellant: *D. R. M. Henry* (instructed by The Registrar, Court of Criminal Appeal). For the Crown: *J. M. Milne* (instructed by N. M. Fowler, High Wycombe).

Held, allowing the appeal, that section 6 of the Criminal Justice Act, 1948, under which the quarter sessions purported to act, did not apply in this case. That section enabled the court to deal with a breach of a condition of a probation order, but subsection (6) expressly excluded the power to deal with a probationer convicted of an offence during the probation period. Section 8 of the Act of 1948 gave power to deal with a probationer convicted of an offence during the probation period. However, where an illegal sentence had been passed by magistrates, as in the present case, the Queen's Bench Division, on an application for an order of certiorari, had no power to put it right; the conviction would be bad on the face of the record and had to be quashed. The Home Secretary had not, of course, quashed the conviction by releasing the appellant; he had acted under his prerogative powers. But this court did not think that the conviction and sentence of the magistrates' court in the present case ought to be allowed to operate to support a breach of recognisance. The sentence of Borstal training could not, therefore, properly be upheld and the appeal would be allowed. This court had jurisdiction to deal with an appellant sentenced for a breach of recognisance or breach of a probation order. The decision in *R.* v. *Smith* [1925] 1 K.B. 603 had been doubted, but the doubt had subsequently been resolved and the position now was that a person brought before a court for breach of recognisance or breach of a probation order had a right of appeal. [H. P.]

COMMENTARY. The Act prescribes different procedures to be followed (a) where the probationer fails to comply with any of the requirements of the order (s. 6) and (b) where he is convicted of a further offence during the probation period (s. 8). It seems that the court thought section 6 did not apply because the accused had been convicted and section 8 did not apply because the conviction was liable to be quashed.

In *R.* v. *Smith* it was held that an accused may appeal against a sentence imposed on a breach of recognisance on the ground that he did not in fact break his recognisance.

Revenue—*Debt to Inland Revenue—whether contracted for the purpose of . . . trade or business*

R. *v.* VACCARI [7] (Court of Criminal Appeal: Cassels, Streatfeild and Slade JJ.: February 10, 1958) (*The Times*, February 11, 1958).

V. was convicted at quarter sessions of contributing to or increasing his insolvency by gambling contrary to section 157 (1) of the Bankruptcy Act, 1914. V. was the proprietor of a café who had been adjudicated bankrupt. At the time of his adjudication V. owed the Inland Revenue the sum of £7,000 in respect of income tax. Section 157 (1) provides: " Any person who has been adjudged bankrupt . . . shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business . . . he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling . . . unconnected with his trade or business." V. appealed to the Court of Criminal Appeal (by certificate granted by the deputy chairman) on the ground that the debt to the Inland Revenue was not a debt contracted " in the course and for the purpose of such trade or business."

Held, allowing the appeal, that income tax was not a debt arising in the course of or out of a trade or business. It was a liability due directly to the Crown, calculated on the profits or gains in the course of the business, but nothing to do with the actual business in the way of a trade debt ; it was a statutory liability which had to be paid. Although it had been found in the present case that V.'s estate was considerably diminished by gambling, that was not a mischief within section 157 (1) of the Bankruptcy Act, 1914. Accordingly, the conviction would be quashed. [H. P.]

COMMENTARY. Counsel for the Crown found that he was unable to argue that the debt to the Inland Revenue was a debt contracted in the accused's trade or business. The court thought the result a strange one—but that was a matter for Parliament.

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[7] For the appellant: *Victor Durand* (instructed by Messrs. Hardcastle, Sanders & Armitage). For the Crown: *Alistair Morton, Patrick Whelan* (instructed by the Director of Public Prosecutions).

Road Traffic—*Medical examination—procedure*

TAYLOR *v.* IRVINE[8] (High Court of Justiciary: Lord Justice General (Lord Clyde): November 27, 1957) (1958 S.L.T. 15).

The accused, the driver of a motor-car, was charged, *inter alia,* with an offence under section 15 of the Road Traffic Act, 1930 (which section relates to drunkenness). He was taken to a police station where he was asked if he had any objection to being examined by a doctor, the result of whose examination might be used in evidence at his trial. The accused replied that he had no objection. The accused was subsequently convicted of the offence.

In stating a case for the High Court of Justiciary, the Sheriff-Substitute found as a fact that " it was . . . quite clear to the [accused] that he did not require to submit to medical examination."

Before the High Court it was argued that the accused should have been specifically informed that he had not been compelled to submit to a medical examination, and that therefore the medical evidence at the accused's trial had been wrongly admitted.

Held, refusing the appeal, (1) that three preliminaries must be proved to have preceded a medical examination in a case under section 15: that the accused consented to the examination, that he had been informed that the results of the examination might be used in evidence, and that he had been informed that he was not compelled to submit to the examination at all;

(2) that these requirements were satisfied if the accused's reply to one or more of the preliminaries showed that he was cognisant of the others: it was unnecessary in such circumstances for each preliminary to be put to the accused specifically; and

(3) that it was clear from the Sheriff-Substitute's findings of fact that the accused had been so cognisant. Accordingly the medical evidence had properly been admitted. [D. C.]

COMMENTARY. The Scottish law on the point seems to be stricter than the English. There seems to be no requirement in English law of anything in the nature of a caution and, indeed, it was held in *R.* v. *Nowell* [1948] 1 All E.R. 794 that the medical evidence will be admissible notwithstanding that the accused only submitted to the examination when told that it might " be better " for him to do so.

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[8] For the appellant: *King Murray* (instructed by Messrs. Fairbairn & Fairbairn, S.S.C.). For the respondent: *Brand* (instructed by Lionel I Gordon, Esq., Crown Agent).

Such an inducement would almost certainly exclude a confession made in consequence of it. The ground for exclusion of the confession, however, is that the threat or promise has rendered it unreliable. That objection does not apply to the medical evidence.

Evidence will not be excluded in English law because it has been illegally obtained: *Kuruma* v. *R.* [1955] A.C. 197; and it would seem to follow that evidence obtained without the accused's consent, or against his will, would be admissible in law. So a Canadian court, following *Nowell*, held that evidence of the analysis of a blood sample, obtained from the accused by a person in authority without the accused's consent, was admissible in evidence against him: *R.* v. *McIntyre* [1952] 2 D.L.R. 713. For a criticism of the English law, see Cowen and Carter, *Essays on the Law of Evidence*, 72.

Road Traffic—*Obstruction—exemption under local Act of Parliament*

BAXTER *v.* MATTHEWS[9] (West London Magistrates' Court: E. R. Guest, Esq., Metropolitan Magistrate: January 28; February 25, 1958).

The defendant was charged for that he "at Brompton Square, S.W.3, . . . did by negligence interrupt the free passage of a carriage on the highway," contrary to section 78 of the Highway Act, 1835.

Section 113 of the Highway Act, 1835, provides: "That nothing in this Act contained shall apply . . . to any roads, bridges, carriageways, cartways, horseways [etc.] . . . which now are or may hereafter be paved, repaired, or cleansed, broken up, or diverted, under or by virtue of the provisions of any Local or Personal Act or Acts of Parliament." It was submitted for the defendant that no offence had been committed under the Act of 1835, since at the date of the coming into force of that Act and at the date of the alleged offence there were in force certain provisions of local Acts of Parliament empowering and requiring the local authorities to cleanse and repair Brompton Square.

The magistrate *held* that on its true construction section 113 of the Act of 1835 restricted the application only of those parts of that Act which were concerned with paving, repairing, cleansing, breaking up or diverting, and thus did not restrict the application of section 78. He accordingly rejected the submission and, after hearing evidence, convicted the accused of the offence charged. [C. J. C. MCOUSTRA, *Barrister-at-Law.*]

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[9] For the prosecution: *G. J. Black* (Solicitor, Metropolitan Police). For the defence: *C. J. C. McOustra* (instructed by Abbott, Baldwin and Co.).

COMMENTARY. The view taken by the magistrate is in accordance with that expressed in the Court of Queen's Bench in *R.* v. *Paynter* (1849) 13 Q.B. 399. It was there held that Putney Bridge was not exempted from rateability under section 27 of the Act, notwithstanding that it was paved, repaired and cleansed under the provisions of a local Act of Parliament. Patteson J. said that the right construction of the Act was " that nothing in the Act relating to paving, repairing, etc., of ways shall apply to those ways which are, or may in future be, paved, repaired, etc., under the provisions of local Acts."

Trial—*Separate indictments—nullity*

R. *v.* COWDELL [10] (Court of Criminal Appeal: Lord Goddard C.J.. Cassels and Slade JJ.: February 17, 1958).

C. was tried at quarter sessions on two indictments together, one of malicious damage and one of causing grievous bodily harm. The recorder withdrew the case of malicious damage from the jury (in summing-up) and the jury convicted on the indictment of grievous bodily harm. On appeal to the Court of Criminal Appeal: —

Held, allowing the appeal, that the trial was a nullity and the conviction must be quashed. In the circumstances of this case a *venire de novo* would not be ordered. [H. P.]

COMMENTARY. Counsel for the Crown conceded that the trial was a nullity, but asked the court to order a *venire de novo*—a new trial. No doubt the court had power to take this course, but declined to do so, apparently without giving reasons. See Archbold, 189.

Acts and Orders *

Animals

TUBERCULOSIS (ERADICATION AREA) ORDERS, 1958 ; PERTHSHIRE (S.I. No. 211) ; MORAYSHIRE AND BANFFSHIRE (S.I. No. 212) ; SOUTH-EAST SCOTLAND (S.I. No. 213) ; SOUTH-EAST ENGLAND (S.I. No. 228) ; SOUTH-WEST ENGLAND (S.I. No. 229) ; all operative March 1, 1958. A number of areas, which are set out in the Schedules to these Orders, are declared to be eradication areas for purposes connected with the control of tuberculosis within the provisions of section 5 of the Diseases of Animals Act, 1950 (14

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[10] The appellant did not appear and was not represented. For the Crown: *Richard Tucker* (instructed by Philip Baker & Co., Birmingham).

* Prepared by F. Maurice Drake, Barrister-at-Law.

Geo. 6, c. 36); and as from the operative date the areas will be subject to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. No. 2006), as amended in 1955 (S.I. No. 1449). These provisions include, *inter alia*, a prohibition against movement of cattle into such an area except under licence or on certain transit journeys.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Birds

WILD BIRDS (LOW PARKS SANCTUARY, HAMILTON) ORDER, 1958 (S.I. No. 281): operative March 14, 1958. A bird sanctuary is created in the area of the Burgh of Hamilton, Lanarkshire, described in the Schedule to the Order. It is an offence for any person wilfully to kill, injure or take any wild bird in the sanctuary or to attempt to do so, or to take or destroy an egg of any wild bird. It is also an offence to enter the sanctuary at any time unless authorised in writing to do so by the town clerk of the Burgh of Hamilton.

A person committing an offence under this Order is liable to the special penalties prescribed in section 12 (2) (*a*) of the Protection of Birds Act, 1954 (2 & 3 Eliz. 2, c. 30; [1954] Crim.L.R. 638).

Civil Aviation

COLONIAL AIR NAVIGATION (AMENDMENT) ORDER, 1958 (S.I. No. 258): operative May 1, 1958. The 1955 Order (S.I. 1955, No. 711) is further amended by (1) extending the provisions of Article 22 of that Order, which relate to the number and description of the operating crew of aircraft, so as to apply also to the number and description of other persons having duties to perform in the aircraft; and (2) modifying the provisions of Rule 71 of the Rules of the Air in the Second Schedule to that Order, which relates to the lights to be shown by certain aircraft registered in Colonial territories.

For penalties for contraventions, see Article 69 of the Order of 1955.

Explosives

CONVEYANCE OF EXPLOSIVES BYELAWS, 1958 (S.I. No. 230); operative February 17, 1958. These by-laws are made under the provisions of sections 37 and 39 of the Explosives Act, 1875 (38 & 39 Vict. c. 17), and relate to the conveyance, loading and unloading of explosives in cases in which by-laws made under other provisions of that Act do not apply. By-law 2 of the existing By-laws places restrictions on the conveyance in any carriage or boat of explosives of certain kinds with explosives of different kinds. Under the present proviso detonators not exceeding 10,000 in number are exempted from this restriction if certain packing conditions are complied with. By-law 1 of these by-laws raises the number to 20,000. By-law 4 of the existing by-laws prescribes certain regulations with regard to the conveyance of explosives in any carriage (other than a carriage on a private railway), and the quantity of explosives to be conveyed in one carriage is limited to 2,000 lb. unless certain conditions are complied with, in which case the quantity is raised to 6,000 lb. By-law 2 of these by-laws raises this amount from 6,000 to 8,000 lb.

For penalties for contraventions, see sections 37 and 39 of the Explosives Act, 1875.

London Traffic

The following Order has been made regulating traffic by prohibiting vehicles of a certain weight to use the roads specified in the Schedule: S.I. No. 124 (Basildon and Thurrock).

Medicine

Therapeutic Substances (Supply of Substances for Analysis) Regulations, 1958 (S.I. No. 214); operative February 17, 1958. The sale and supply of therapeutic substances, for the purpose of analysis, to public and agricultural analysts, sampling officers and certain other persons, is freed from the restrictions imposed by section 9 (1) of the Therapeutic Substances Act, 1956 (4 & 5 Eliz. 2, c. 25; [1956] Crim.L.R. 353).

Merchant Shipping

Merchant Shipping (Foreign Deserters) (Federal Republic of Germany) Order, 1958 (S.I. No. 142); operative February 4, 1958. Provision is made for the apprehension of deserters from merchant ships registered in the Federal Republic of Germany, at ports in the United Kingdom, the Channel Islands, the Isle of Man, or any Colony, and with certain exceptions for their return to their ships. These provisions give effect to the Consular Convention between the United Kingdom and the Federal Republic of Germany, which was signed at Bonn on July 30, 1956.

Public Health

Clean Air Act, 1956 (Appointed Day) Order, 1958 (S.I. No. 167): operative February 7, 1958. Certain provisions of the Clean Air Act, 1956 (4 & 5 Eliz. 2, c. 52; [1956] Crim.L.R. 645), were brought into operation by a similar Order in 1956 (S.I. 1956, No. 2022; [1957] Crim.L.R. 131). All of the remaining provisions of that Act are now brought into operation. These include measures for dealing with grit and dust from furnaces, abatement of smoke nuisance, provisions relating to the prohibition of dark smoke from chimneys and the application of the Act to railway engines, vessels and Crown premises.

For penalties for contraventions, see sections 16 and 27 of the Clean Air Act, 1956.

Revenue

EXCHANGE CONTROL (IMPORT AND EXPORT) ORDER, 1958 (S.I. No. 299): operative February 28, 1958. Previous Orders which prescribed the currency notes, etc., that a traveller may bring into and take out of the United Kingdom and the Channel Islands, or that may be sent into and out of the United Kingdom and Channel Islands, are revoked and re-enacted with amendment. The amendment allows notes which are or have been legal tender in any part of the United Kingdom and the Channel Islands to be imported freely into the United Kingdom and Channel Islands.

Road Traffic

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 151); operative March 1, 1958. The principal Regulations (S.I. 1950, No. 333) are further amended by prescribing that the fee payable on the grant of a provisional licence (which is at present five shillings) shall be ten shillings as from March 1, 1958.

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT No. 7) ORDER, 1958 (S.I. No. 149): operative January 27, 1958. Section 18 (2) of the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67; [1956] Crim. L.R. 758–766), is brought into operation on March 1, 1958. This subsection provides that provisional licences shall be for a period of six instead of three months and shall cost ten shillings instead of five shillings.

ROAD VEHICLES LIGHTING (PROJECTING LOADS) ORDER, 1958 (S.I. No. 152), and REGULATIONS, 1958 (S.I. No. 153): both operative October 1, 1958. The Order brings into operation on October 1, 1958, subsections (2) to (6) of section 8 of the Road Transport Lighting Act, 1957 (5 & 6 Eliz. 2, c. 51; [1957] Crim.L.R. 699), which make new provisions for vehicles carrying overhanging or projecting loads.

The Regulations, made under the same subsection of section 8 of the Act, contain provisions which, *inter alia*, (a) require any vehicle on a road carrying, during the hours of darkness, a load projecting more than three and a half feet to the rear of its tail lamp to carry a red rear lamp, complying with the prescribed conditions, not more than three and a half feet from the extreme rear of the load, and (b) empower the Minister of Transport and Civil Aviation to make regulations requiring any load, which overhangs any side of a vehicle by more than the prescribed distance, to be indicated during the hours of darkness by a red rear lamp complying with the prescribed conditions. The prescribed distance of lateral overhang is, generally, one foot, measured from the side of the vehicle in the manner set out in the Regulations.

For penalties for contraventions, see section 12 of the Road Transport Lighting Act, 1957.

Scotland

See under Animals, p. 264, above.
See under Birds, p. 265, above.

Theatre and Cinematograph

CINEMATOGRAPH FILMS (DISTRIBUTION OF LEVY) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 270): operative March 1, 1958. The principal Regulations (S.I. 1957, No. 1342; [1957] Crim.L.R. 700), are amended by (1) expanding for the purpose of classification the definition of "television film" in regard to the exhibition of excerpts; (2) providing that a film shall not be brought within the definition of television film by reason only of the fact that an agreement or arrangement for its exhibition on television was entered into before October 20, 1957 (the date on which the principal Regulations became operative) or that it had been exhibited on television before that date; and (3) making a consequential amendment to the definition of the word "film."

For penalties for contraventions, see section 4 of the Cinematograph Films Act, 1957.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

43. *Movement of abnormal loads: failure to notify police*

We are interested to see in [1957] Crim.L.R. 802, that a firm of Hauliers had been fined £10 on each of two summonses for failing to notify the police of the movement of an abnormal load contrary to Regulation 19 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955. We have heard of similar convictions under the same article and other articles of that Order.

We have recently successfully argued that no proceedings can be taken under this Order for the following reasons:

1. Section 3 (1) of the Road Traffic Act, 1930, makes unlawful the use on a road of any vehicle not complying with the regulations applicable thereto (*i.e.*, The Motor Vehicles (Construction and Use) Regulations, 1955).
2. By proviso (*b*) of the same section the Minister may by order authorise, subject to such restrictions and conditions as may be specified in the order, the use on roads of special types of vehicles which are constructed for special purposes (*i.e.*, The Motor Vehicles (Authorisation of Special Types) Order, 1955.
3. By Article 14 of the Special Types Order the Minister authorises the use on roads of vehicles specially designed and constructed for the carriage of abnormal indivisible loads notwithstanding that they do not comply in all respects with the requirements of the Construction and Use Regulations, subject to the conditions and restrictions contained in Articles 16, 18, 19, 20 and 21 of the Order and to the conditions and restrictions (*a*) to (*k*) of Article 14.
4. In our view the authority given by Article 14 of the Special Types Order is a limited authority and is not conferred unless the conditions and restrictions therein referred to

are complied with. If they are not complied with the use of the vehicle on a road is not authorised by Article 14 of the Special Types Order and its use on a road is necessarily in breach of the Construction and Use Regulations and any summonses should be taken out under those Regulations.

5. We are fortified in our view by the fact that there are in any event no penal provisions in the Special Types Order.

[A. B. T.]

ANSWER

This is an interesting point since there is no doubt that several summons have been served, and several convictions obtained in consequence, on the grounds that the defendant failed to notify the police of the movement of an abnormal load contrary to regulation 19 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955, No. 1038, as amended by S.I. 1956, No. 1265).

In my opinion there is no doubt at all that the correct wording of the summons would allege an offence contrary to the provision of the Motor Vehicle (Construction and Use) Regulations, 1955, and I agree fully with the arguments set out in the question above.

It is rather more difficult to aver the practical consequences of any successful objection being made to prosecutions taken under the wrong Order. Assuming that the defendant is well represented and his legal adviser is aware that the summons is defective, objection ought properly to be taken at the outset. There would appear to be no reason why the police should not re-serve a properly worded summons. But, of course, this does not excuse the prosecution from their duty to see that the summons is properly worded in the first place, and in my opinion this question may well serve a useful purpose in directing the attention of the prosecuting authorities to the point. [M. D.]

Books and Periodicals

Reviews:

The Urge to Punish. By H. Weihofen, Professor of Law, University of New Mexico. London: Gollancz, Ltd. 1957. x and 213 pp. (including index). (15s.)

This book is concerned with mental disorder and responsibility for crime. Consisting as it does of the Isaac Ray Lectures delivered at Temple University, Philadelphia, in December, 1955, the diminished responsibility rule in relation to homicide, introduced into English law by the Homicide Act, 1957, cuts away some of the ground covered by the author's consideration of the M'Naughten rules. Since the latter are still preserved in our law and are available to the offender whether the crime alleged is homicide or some other offence, the book contains much that is of importance and relevant to present-day considerations of mental disorder and crime.

The Model Code dealing with mental responsibility, drafted by the American Law Institute, is considered in Chapter Five, in so far as it deals with procedural rules, and will be of interest to anyone concerned with this aspect. For example, the impartial psychiatric examination and hospital commitment for observation are matters which raise many problems.

The last chapter, Chapter 6, gives the book its title and consists of a discussion of the purpose of punishment with particular emphasis on the death sentence. Except in this chapter, the book is mainly concerned with the M'Naughten rules, which in England are rarely pleaded if homicide is not involved. Now that diminished responsibility can be raised in the case of homicides it may be that, freed from the emotion engendered by the death sentence, more consideration will be given to mental disturbance as affecting responsibility for other crimes. It is particularly in respect of this problem that the book will be of interest to readers in this country.

T. E. James.

Personal Identity. By C. H. Rolph. London: Michael Joseph. 1957. 205 pp. (15s.)

In this book Mr. C. H. Rolph considers the many problems of proving identity for the purposes of the law. He considers the relative merits of identification parades, fingerprints and documents as means of identification. In the course of his discussion of various documents he tells the interesting story of Mr. Clarence Henry Willcock, who was largely responsible for the final abolition of wartime identity cards, and we also learn how inconclusive birth and marriage certificates can be.

A number of familiar cases of mistaken or confused identity are recalled—Adolf Beck, Oscar Slater and the Tichborne Claimant—and the full story of the 1955 case of Emery, Thompson and Powers is told, which leads into an interesting digression into the inadequacy of the procedure for "pardoning" and compensating victims of wrongful convictions.

Another aspect of the subject is considered by Mr. Rolph in the chapter on Miles Giffard and the problems of schizophrenia.

The book is well written and the arguments are presented in a lucid form. Mr. Rolph skilfully avoids the temptation to indulge in a too philosophical discussion of the problem of identity, although it is clear that this aspect is never far from his mind. The result is a book which will appeal to lawyers and laymen alike.

A. L. N.

Books received:

Psychiatry and the Criminal. By John M. Macdonald, M.D. Springfield, Illinois, U.S.A.: Charles C. Thomas. 1958. 213 and (index) 12 pp. (£2 2s. net.)

Sober as a Judge. By Henry Cecil. London: Michael Joseph. 1958. 205 pp. (13s. 6d. net.)

Readers' Digest:

Affray: 122 *Justice of the Peace* 135.

Evidence: Admissibility of statements and confessions: 225 *Law Times* 81.

Larceny: Consent: 122 *Justice of the Peace* 101.

Penology: Crime and punishment: 122 *Justice of the Peace* 102.

Practice and procedure: Exhibits: 66 *Police Review* 92.

Practice and procedure: The function of the judge: 225 *Law Times* 71.

Road Traffic: Motor-vehicles from abroad: 66 *Police Review* 88, 108.

THE CRIMINAL LAW REVIEW

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Editorial

Young criminals

The past month has seen the problem of serious crime committed by young persons brought to the forefront of public discussion.

The discussion was opened by Mr. L. A. Hackett, chairman of the Wokingham (Berks) justices when he said that, in his experience, crimes committed by children and young persons were of a far worse nature than those committed by adults. Whereas most of the adults who appeared before him were charged with road traffic offences, the children brought before the juvenile court were charged with offences such as breaking and entering, larceny, receiving, and sexual misbehaviour, crimes which, if committed by adults, carried penalties of from 3 months' to 14 years' imprisonment.

Mr. Hackett said that many of the children who appeared before the Wokingham Juvenile Court had poor school attendance records, and he considered that a large measure of responsibility for juvenile crime in the county fell upon the county education authorities for failing to deal with this matter. The Berkshire Education Committee investigated these allegations and found no link between juvenile delinquency and absence from school. Other counties reached similar conclusions ; the school attendance average throughout the country is 90 per cent., but despite this higher than ever average, juvenile crime continues to increase.

Meanwhile, the chairman of the Middlesex Sessions, Mr. Ewen Montagu, Q.C., added his comments to those of Mr. Hackett. He pointed out that, out of 82 cases of dishonesty on the March calendar, only 17 were committed by persons aged 25 or more. Over half the remaining offences were committed by persons in the 17 to 20 age group. Mr. Montagu blamed parents who allowed their children to roam the streets and frequent cafés until after 11 o'clock at night.

The Times, in its leading article on March 24, considered the comments made by these two magistrates, and pointed out that, except in the 17 to 20 age group, the balance of crime has not changed very much since before the Second World War, and, in fact, crimes committed by children under 17 have decreased.

Suggested causes for this increase in crimes committed by youths of 17 to 20 include the disruption of war. *The Times* points out that the 1935–40 age group, all through their school years and adolescence, seem to have excelled in criminality both those born earlier and those born later. A certain amount of blame must also, it is suggested, attach to the "Welfare State" and the present inflationary state of affairs. But, in general, letters to *The Times* have singled out for blame, as Mr. Montagu has done, the parents of these young offenders.

The problem of what to do with these young offenders is racking the brains of all who are concerned with the administration of the criminal law. The lack of co-operation shown by these young people with the courts and the probation officers whose business it is to help them makes it doubly difficult to find any solution. It is Mr. Geoffrey Stevens' submission that an increase in the maximum fines which can be imposed for many of the minor offences with which these young people begin their careers of crime would do much to increase their respect for law and order. The debate on the Second Reading of the Metropolitan Police Act, 1839 (Amendment) Bill shows that Members of Parliament are not blind to the ridicule in which the law is sometimes held by these irresponsible youngsters, and we are pleased to see that the Home Office is lending its support to the Bill.

"Using" a car

A correspondent has sent us a newspaper cutting and a brief note of an interesting case heard at Guildford Borough Magistrates' Court on March 17, 24 and 31. The defendant, 23-year-old Alfred John Meeks, was summoned for using a car not insured against third-party risks, to which charge he pleaded guilty. The facts were that, on January 17, a police constable saw Meeks with the car outside his home, to which he had moved it from a garage 100 yards away. The constable asked Meeks for his insurance certificate; the defendant was unable to produce one and said: "It doesn't matter, because I was not using it anyway. You can't do anything about it. I pushed it on to the road."

The justices advised Meeks to change his plea of guilty, granted him legal aid and adjourned the case until March 24, when the defendant was represented by a solicitor, who asked for a further adjournment so that he could investigate the legal aspects of the case. The case was finally cleared on March 31, when the chairman of the justices, Judge A. A. Gordon Clark, said that the bench were satisfied that the act of pushing the car along the road constituted user. Meeks was fined £5 and had his licence endorsed. To a second charge of being in charge of a motor-car without efficient front or rear lights he pleaded guilty and was fined £1.

The decision on the question of user is an interesting one, as no guidance is given on the subject in section 35 of the Road Traffic Act, 1930, which creates the offence, nor is the point considered by the learned editors of Stone's *Justices' Manual*.

Section 35 defines the offence as follows: "It shall not be lawful for any person to use . . . a motor-vehicle on a road unless there is in force in relation to the user of the vehicle by that person . . . a policy of insurance . . . in respect of third-party risks." There is an abundance of authority, both statutory and judicial, defining "motor-vehicle" and "road" and also delimiting the various types of user for which a vehicle can be insured. The expression "policy of insurance" is defined in section 36 of the Act. The expression "to use" seems, however, to have escaped judicial consideration in relation to this offence. The question of the meaning of this expression was, however, considered in connection with the Motor Vehicles (Construction and Use) Regulations, 1937, in *Gifford* v. *Whittaker* [1942] 1 K.B. 501, and while the question was directed at discovering who was the "person using" the vehicle, some points of guidance emerge. Counsel drew attention to the fact that other regulations use the expressions "to drive" and "to be in charge of" rather than "to use"; this is equally true of other road traffic offences (it is not, for example, an offence "to use" a motor-vehicle on a road without holding a driving licence, only to drive it in such circumstances). The implication, then, is that "using" is not the same as driving or being in charge of a motor-vehicle, and it was suggested in *Gifford* v. *Whittaker* that the person in charge of a vehicle, as well as the person driving it, might be the person "using" it; *a fortiori*, when there is no one driving.

Analogies can be drawn with such cases as *Moses* v. *Raywood* [1911] 2 K.B. 271, where a net was being "used in taking" salmon, even though the net had not been put into the water, the general implication from such cases being that, if a thing is in a condition for being used, it is being used. This attitude is further confirmed by the cases on whether or not a vehicle is mechanically propelled within the meaning of section 1 of the Road Traffic Act, 1930 (*cf. Lawrence* v. *Howlett* [1952] 2 All E.R. 74; *Floyd* v. *Bush* [1953] 1 W.L.R. 242).

Gas-meter thefts and gas poisoning

Earlier this year, at [1958] Crim.L.R. 70, we considered, with the assistance of Professor J. C. Smith, the problems which would have arisen in English law had the events concerned, the deaths of a man and his infant daughter from gas poisoning after the theft of a gas meter, taken place in England. In fact, the deaths and the theft which caused them, took place in Scotland; the thief was apprehended, charged, and found guilty of culpable homicide on March 6. He was sentenced to five years' imprisonment. Although culpable homicide corresponds, more or less, to the English crime of manslaughter, the problems of proving liability do not seem to be so complex in Scottish law as they are in English law. Where there is no intent to kill, the prosecution in Scotland must prove " gross and palpable carelessness " [1] not, it appears, actual foresight of the consequences.

Sikhs and the oath

We are indebted to the editor of *The Magistrate* and to Mr. Edward G. Love for permission to reproduce from the March issue of *The Magistrate* the note on the administration of the oath to a Sikh, at p. 324, *post*.

Parliament

Breach of probation: sentence

The Home Secretary said, in reply to a written question, that, while he is aware of the difficulties experienced by courts in sentencing persons under section 8 (5) of the Criminal Justice Act, 1948, the questioner's proposal, that the court which sentences the offender for the original offence should also sentence him for the offence committed during the probation period, is impracticable. This is because it would, in some cases, involve persons convicted before superior courts being sent for sentence to magistrates' courts with limited powers. Mr. Butler thought that section 8 (6) and (7) made sufficient provision for these cases. These subsections enable the court dealing with the fresh offence to deal also with an earlier offence in which a court of summary jurisdiction has made a probation order or an order of conditional discharge (H.C. Debates, Vol. 584, col. *180*, March 21).

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[1] *Cranston*, 1931 J.C. 28.

Chief constables

The Home Secretary has refused to consider introducing legislation to extend to the Secretary of State for the Home Department such power over chief constables as would seem necessary in order to enable Members of Parliament to raise questions in the House of Commons concerning the conduct of police officers in provincial forces. Mr. Butler said that the organisation and control of our police service on a local basis is an essential feature of the system; the power of Members to ask questions concerning the Metropolitan Police is an anomaly; it would be wrong to have the police forces centralised; and it was not so important to have the same right of questioning for each particular force. Mr. Lagden, who had asked the question, gave notice that, in view of the unsatisfactory nature of the Home Secretary's reply, he would raise the matter on the Adjournment at the earliest possible opportunity. Under the present system questions as to the conduct of local police officers should, of course, be raised with the local authority responsible for their existence (H.C. Debates, Vol. 585, col. *573*, March 27).

Crimes of violence

The Secretary of State for the Home Department said, in reply to the third question he has received in recent weeks on this subject, that his department have been studying various schemes for compensating victims of crimes of violence, notably those injured in the execution of their duty. All of these schemes are, according to Mr. Butler, good from the idealist point of view but difficult to put into operation. Members of Parliament are, it appears from the tone of the questions, somewhat restive on account of the Government's failure to act on this matter (H.C. Debates, Vol. 585, col. *579*, March 27).

Further questions asked in connection with the recent increase in crimes of violence drew from Mr. Butler the statement that he had no doubt that the Department of Criminal Science at Cambridge University were taking pay robberies into account in conducting their inquiries into corporal punishment and crimes of violence (H.C. Debates, Vol. 585, col. *570*, March 27).

Miss Patricia Hornsby-Smith, Joint Under-Secretary of State to the Home Office, has stated that the Home Office do not consider that the information they have shows any need for the deportation of all British subjects not born in the United Kingdom found guilty of crimes of violence (H.C. Debates, Vol. 585, col. *570*, March 27).

Metropolitan Police Act, 1839 (Amendment) Bill

After a lengthy debate, this Bill received its Second Reading in the House of Commons on March 7. The Bill aims at increasing the present maximum penalty of 40s. for offences contrary to paragraph 13 of section 54 of the 1839 Act, which reads as follows:

> "Every person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

(H.C. Debates, Vol. 583, cols. 1581 *et seq.*, March 7.)

Judicial appointments

Francis John Watkin Williams, Esq., Q.C., has been appointed Recorder of the City of Chester.

Peter Stanley Price, Esq., Q.C., has been appointed Recorder of the City of Kingston upon Hull.

Bernard Benjamin Gillis, Esq., Q.C., has been appointed Recorder of the City of Bradford.

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D.P.P. v. Head: A Question of Proof

An appeal lies to the House of Lords in a criminal case only if the Attorney-General certifies both that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is in the public interest that a further appeal should be brought.[1] Any case in respect of which such a certificate is granted ought to be worthy of study; the case of *Director of Public Prosecutions* v. *Head* [2] deserves, perhaps, particularly close consideration, for it is the first to reach the House of Lords since public attention was focused on the appellate procedure by the Attorney-General's refusal of his certificate in the case of *R.* v. *Vickers.*[3]

The nature of the case

Head was charged with two offences of carnal knowledge of a woman on licence from an institution for mental defectives. The charges were laid under section 56 (1) of the Mental Deficiency Act, 1913, which, so far as it is relevant, provides that a misdemeanour is committed by any person who " (*a*) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act." Paragraphs (*b*), (*c*), (*d*) and (*e*) relate to offences against defectives as such and there is a proviso that it shall be a good defence to any charge under the subsection for the accused to prove that " he did not know, and had no reason to suspect, that the woman or girl was a defective."

There was uncontradicted, and unchallenged, evidence that Head had been warned that the woman concerned was at all material times on licence from an institution for mental defectives and he himself admitted one act of intercourse with her. A hasty glance at the terms of section 56 (1) (*a*) might suggest that, having proved those facts, the prosecution had proved the guilt of the accused; and indeed that view of the case commended itself to Lord Simonds when it came to be considered by the House of Lords. The prosecution also tendered in evidence, however, a large number of documents whose effect can best be described as illustrating the history of the girl's treatment as a mental defective. The material documents, for the purposes of the subsequent appeals, were the certificates of two doctors that she was a moral defective within the meaning of section 1 of the Mental Deficiency Act, 1913 [4]; an order by the Home Secretary based on those certificates, authorising her transfer from an approved school to an institution for mental defectives [5]; and orders made by the Board of Control on October 5, 1948, October 4, 1949, and October 6, 1954, continuing her detention in such an institution for (respectively) one year from September 29, 1948, five years from September 29, 1949, and five years from September 29, 1954.[6]

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[1] Criminal Appeal Act, 1907, s. 1 (6).

[2] [1958] 2 W.L.R. 617, *post,* p. 330, affirming the decision of the Court of Criminal Appeal, *sub nom. R.* v. *Head* [1958] 1 Q.B. 132, where separate judgments were delivered in pursuance of section 1 (5) of the Criminal Appeal Act. See, for another example of the exercise of the power conferred by this subsection, *R.* v. *Ibrahim, The Times,* December 11, 1957.

[3] [1957] 2 Q.B. 664.

In the House of Lords the Attorney-General appears to have argued that the orders made by the Home Secretary and the Board of Control were not receivable in evidence.[7] There does not, however, appear to be very much doubt that that argument was misconceived: they are public documents and therefore receivable on production of the original from the proper custody [8]; in addition, the Home Secretary's order could, by virtue of section 14 of the Evidence Act, 1851, be proved by the production of an examined copy[9]; and, by virtue of section 11 (5) of the Mental Deficiency Act, 1913, a certificate by the Secretary of the Board of Control is sufficient evidence that a continuing order has been made by the Board. There is also, it would appear, equally little doubt what facts the documents are admissible to prove: as public documents they are conclusive evidence of the orders which they respectively purported to make and prima facie evidence of the facts necessary to establish the validity of those orders: *Harvey* v. *R.*[10]; *Hill* v. *Clifford.*[11] The Home Secretary's order was made under section 9 of the Mental Deficiency Act, 1913, which provides, so far as it is relevant, that—

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[4] The section defines "mental defectiveness" as "a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury." Mental defectives within the meaning of the Act are persons in whose case there exists a specified degree of such defectiveness and they are classified as (a) idiots, (b) imbeciles, (c) feeble-minded persons, or (d) moral defectives.

[5] The order was made under section 9 of the Mental Deficiency Act, 1913, the relevant provisions of which are set out below, p. 281.

[6] Section 11 of the Mental Deficiency Act, 1913, provides that orders made under the Act shall expire by lapse of time unless they are continued by orders made by the Board of Control under subsection (2) of that section. The proviso to subsection (1) enables the Board to direct that in the case of any institution the orders shall not expire until the quarter day following the day on which they would expire by lapse of time and there is now in force an order under this proviso applying to all institutions within the Board's jurisdiction (as to which see *R.* v. *Secretary of Board of Control, Re Dawson, ex p. Abdul Kayum* [1949] 1 K.B. 183). Section 1 of the Mental Treatment Act, 1938, which was passed as a result of the decision in *R.* v. *Board of Control, ex p. Winterflood* [1938] 2 K.B. 366, enables the Board to make a continuing order at any time within one month after the day on which the order to be continued expires by virtue of section 11 of the Act of 1913. The result of these provisions is, therefore, that a continuing order can be made within one month after the quarter day, and takes effect from the quarter day, following the day on which the order would expire by virtue of section 11. When the orders of 1948 and 1949 were made by the Board of Control in this case no order under the proviso to that subsection was in force in respect of the institution in which the girl was detained. Those orders were, however, retrospectively validated by section 26 of the National Health Service (Amendment) Act, 1949, and all the orders made by the Board are, therefore, beyond criticism.

[7] [1958] 2 W.L.R. 617, at 629.

[8] Taylor on *Evidence* (12th ed.), p. 943.

> "Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person who is . . . detained in a school approved under section 79 of the Children and Young Persons Act, 1933 . . . is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives."

The order was, therefore, conclusive proof that the Home Secretary made (or purported to make) an order for the transfer of the girl from an approved school to an institution for mental defectives and prima facie evidence that he had been satisfied from the certificates of two duly qualified medical practitioners that she was a defective within the meaning of the Mental Deficiency Acts.

It was never clear what the prosecution hoped to establish by giving the documents in evidence; what is clear is that the defence hoped by challenging them to establish that at the time of the offences the woman was not a mental defective within the meaning of the Mental Deficiency Act. The attack was directed both at the medical certificates (on the ground that the evidence set out in them did not justify certification) and at the continuing orders made by the Board of Control (on the ground that in each case the order was made after the preceding order had expired and was accordingly insufficient to justify the girl's detention: *R.* v. *Board of Control, ex p. Winterflood*[12]). The judge ruled that the defence could not go behind the two medical certificates to challenge the certification and rejected the submission that the orders made by the Board of Control were ineffective.[13] In these circumstances the verdict of guilty was virtually inevitable.

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[9] Lord Denning suggested that the order could also be proved by any of the methods prescribed in section 2 of the Documentary Evidence Act, 1868, which provides for proof of any "proclamation, order, or regulation." This contention would appear to be ill-founded: as appears from the context, the word "order" is, it is suggested, clearly confined to legislative instruments.

[10] [1901] A.C. 601.

[11] [1907] 2 Ch. 236.

[12] [1938] 2 K.B. 366.

The documentary evidence

It was on the terms of the medical certificates that the future history of the case turned. Section 1 of the Mental Deficiency Act, 1913,[14] defines mental defectives for the purposes of the Act as being persons suffering from mental defectiveness in one of four specified degrees, the material categories for the purposes of this case being feeble-mindedness and moral defectiveness. Both medical practitioners had certified that the girl was a moral defective and their certificates set out the evidence on which this conclusion was reached; the evidence on one, however, established no more than that she was a feeble-minded person and the evidence on the other did not disclose any condition of mental defectiveness at all. Head appealed to the Court of Criminal Appeal, with the leave of the court, and after the case had been argued for one day it was adjourned in order to enable the prosecution to communicate with the Board of Control to enable them to be represented, in the words of the Lord Chief Justice, "in order that they may if they are so advised come and argue whether the girl who was said to be a mental defective in this case is legally detained, and we will go into it because if she is not legally detained it will follow no doubt that the prosecution fails."[15]

The Court of Criminal Appeal

When the appeal was reheard the Attorney-General appeared for the Crown and argued that the question whether the girl was on licence from the institution was a mere question of fact which had been adequately proved by the evidence given by the Medical Superintendent of the institution, with the result that the documents tendered by the Crown were wholly irrelevant to the charge and accordingly inadmissible. This argument was rejected. The court held, first, that the words "under this Act" at the end of paragraph (*a*) of section 56 (1) were to be read distributively as governing all the institutions mentioned; second, that the burden imposed on the prosecution was, therefore, proof that the woman was lawfully under care or treatment in, or on licence from, one of those institutions; and, third, that, as the prosecution did not seek to uphold the order made by the Home Secretary, this burden had not been discharged.

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[13] *Supra*, note 6.

[14] *Supra*, note 4

[15] See *The Times*, July 24, 1957.

The value of the judgments delivered by the court is substantially impaired by the patent insufficiency of the premise on which their reasoning is based: the Mental Deficiency Act, 1913, contains no provisions for placing persons in approved homes and it is therefore plain that the words " under this Act " at the end of paragraph (*a*) of subsection (1) of section 56 cannot be read distributively; on the contrary, as a first reading of the paragraph suggests, they apply only to guardianship, an unqualified reference to which would clearly be wrong. But even if the words are read distributively it does not follow that the legality of detention must be affirmatively proved; and the judgments are open to the further objection that they totally ignore the ambiguity latent in the concept of lawful detention which, it will be suggested, also vitiated the decision of the House of Lords. It was not, therefore, surprising that the Attorney-General granted a certificate under section 1 (6) of the Criminal Appeal Act to enable the Director of Public Prosecutions to appeal to the House of Lords.

Lord Denning's judgment

In the House of Lords only Lord Denning reached the conclusion that the onus imposed on the prosecution by section 56 (1) (*a*) of the Mental Deficiency Act, 1913, was, in a case where the woman concerned had been detained in an institution for mental defectives, proof of the legality of her detention. He also agreed with the Court of Criminal Appeal in holding that the best evidence of the legality was proof of the order on which the detention was based, but differed from them in holding that in this instance the Home Secretary's order, having been made with jurisdiction, was a valid order, notwithstanding that it was liable to be set aside in other proceedings on the ground that it was a wrongful exercise of that jurisdiction. Although rejecting the argument that the words " under this Act " should be read distributively, he gave no reason for construing section 56 (1) (*a*) as imposing on the prosecution the duty of proving the legality, rather than the fact, of the woman's detention and it is not easy to see what reason there can be. Proof that a motorist exceeded the speed limit in an area where a system of street lighting is furnished by means of lamps placed not more than 200 yards apart,[16] for example, does not involve proof that the lamps were lawfully erected; and it does not appear to be material that the paragraph was enacted on the assumption that only women properly certified as defectives would be detained in institutions: the object of the section is, plainly, the protection of defectives and proof that a woman is unlawfully detained is not proof that she is not a mental defective within the meaning of the Act. In other words, the fact that Parliament has made certain assumptions in creating a statutory offence does not of itself make it in any particular case a good defence to show that in that instance those assumptions are unjustified.

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[16] Road Traffic Act, 1934, s. 1 (1) (*a*).

Lord Denning held that the Home Secretary's order was valid, because, although (having been made in the wrongful exercise of jurisdiction) it was voidable, it was not void (as it would have been if it had been made without jurisdiction). The other four members of the Appellate Committee expressly reserved the question whether the order was void or voidable, Lord Somervell of Harrow (with whose observations the other three members associated themselves) saying—

> " the distinction between void and voidable is by no means a clear one . . . I am not satisfied that the question whether a man should go or not go to prison should depend upon the distinction." [17]

This objection is not, it is thought, entitled to very much weight: quite apart from the fact that the appeal to the House of Lords was from a decision on an appeal against conviction and not against sentence, there can scarcely be serious doubt that it is a good defence to a charge of bigamy that the first marriage was void, but no defence at all that it was merely voidable. There are, on the contrary, strong grounds for thinking that Lord Denning was right in attaching prime importance to the distinction between void and voidable orders; but it would seem that he was induced to draw a false distinction as a result of the concession made by the Crown, both in the Court of Criminal Appeal and before the House of Lords, that on proceedings for habeas corpus or certiorari the Divisional Court would have quashed the orders authorising the woman's detention.

Ex parte Gilmore: a case out of context

This concession seems to have had two unfortunate results. In the first place, it led both the Court of Criminal Appeal and the House of Lords to consider the validity of the woman's detention as if they were hearing an application for habeas corpus or certiorari.[18] Thus, Lord Denning[19] expressly held (and Lord Somervell of Harrow indicated that he might be prepared to agree with him)[20] that the order made by the Home Secretary had to be read together with the medical certificates on which it was based so that they formed together part of the "record": *R.* v. *Medical Appeal Tribunal, ex parte Gilmore*.[21] It does not, however, seem to have been appreciated that the question which required an answer was, not whether an error appeared on the face of the record (which would have been material on an application for certiorari), but whether the order current at the time of the offences was a valid order. It is one thing to say that the medical certificates form part of the "record"; it is quite another to say that they form part of the order itself: they are, of course, the evidence on which the order was based and therefore distinct from it.

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[17] [1958] 2 W.L.R. 617, at 627.

In the second place, Lord Denning's infelicitous use of the terms "void" and "voidable" appears to derive from his preoccupation with proceedings by way of certiorari in general and the decision in *Ex parte Gilmore* in particular. In reaching the conclusion that the Home Secretary's order was voidable because, although it was not justified by the evidence before him, it was made with jurisdiction, Lord Denning relied on the dictum of Parker L.J. in that case that "a decision arrived at without jurisdiction is in effect a nullity."[22] This is, however, a misleading use of the word "nullity" which was exposed in the words used by Lord Radcliffe in *Smith* v. *East Elloe R.D.C.* when he said—

> "This argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."[23]

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[18] Thus, a large part of Lord Goddard's judgment was directed to the question whether the medical practitioners were, on the material before them, justified in certifying the girl as a mental defective. The relevance of his observations, which would of course have been very much in point on an application for certiorari, is not immediately apparent; and, as neither doctor was represented at any stage in the proceedings, his remarks may, perhaps, be thought to have been unhappily phrased.

[19] [1958] 2 W.L.R. 617, at 632.

[20] [1958] 2 W.L.R. 617, at 627.

[21] [1957] 1 Q.B. 574, at 582.

[22] [1957] 1 Q.B. 574, at 588.

[23] [1956] A.C. 736, at 769–770. In that case the validity of a compulsory purchase order fell to be considered, but the same reasoning clearly applies. Its effect is that a void order may be treated as invalid by the whole world, while a voidable order must be treated as valid until

This passage was cited to the House of Lords by the Attorney-General and was indeed quoted by Lord Denning in his judgment [24]; its effect appears, however, to have been ignored. The courts have been accustomed to say that an order made without jurisdiction is a nullity in the context of statutes providing that the decisions of inferior tribunals shall be "final": in order to reach the conclusion that those decisions were, despite their finality, subject to review on certiorari, the courts have adopted the device of saying that an order made without jurisdiction is not an order within the meaning of the governing statute and is, therefore, a "nullity." There is, however, no other sense in which an order made without jurisdiction can usefully be described as a nullity and it is unfortunate that they should have adopted a word which in its ordinary use has a clear and important meaning.

The passage cited from the judgment in Lord Radcliffe in *Smith* v. *East Elloe R. D. C.* provides, it is suggested, the clue to the distinction which ought to be drawn if it is necessary to consider the validity of an order which is not itself the subject of proceedings by way of certiorari. A licence under Regulation 95 of the Mental Deficiency Regulations, 1948 (S.I. 1948, No. 1000), is liable to be quashed on a number of grounds: among others, that it was made in bad faith; that it was made without jurisdiction; that it was based on an order for detention that was bad on its face or on an order that had at the relevant time already been quashed.[25] At the time of the acts of intercourse, however, the licence which had been granted in this case bore "no brand of invalidity upon its forehead"; no proceedings had been taken at law to establish the cause of invalidity and get it quashed or otherwise upset; and if, as is suggested, Lord Radcliffe's analysis of the situation is correct, it therefore remained as effective for its ostensible purpose as the most impeccable of orders. On this footing the prosecution could have discharged the onus which was held by Lord Denning to be imposed by section 56 (1) (*a*) by production of the licence granted under the Mental Deficiency Regulations; it is unhappily

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it is set aside at the instance of a person aggrieved by it. The analogy with void and voidable marriages is therefore strictly in point, though it must be remembered that a marriage void by reason of the impotence of one of the parties is for these purposes a voidable marriage: *R.* v. *Algar* [1954] 1 Q.B. 279, at 287 (rightly decided on this point).

[24] [1958] 2 W.L.R. 617, at 631.

[25] *Ex hypothesi*, the licence would not be liable to be quashed on the ground that (as was the case here) it was based on an order itself liable to be quashed: an order based on a void order is *ipso facto* voidable, but not necessarily void. *Cf.* [1958] 2 W.L.R. 617, at 634, *per* Lord Denning. As to the effect of the licence, see *R.* v. *Balderstone* (1955) 39 Cr.App.R. 97.

characteristic of the course of this case that this licence was the only document having any bearing on it that was not tendered in evidence.

Grounds of the majority decision

It has already been observed that Lord Simonds dissented from the opinion of the majority of the House of Lords and it is now possible to turn to the grounds upon which Lord Tucker, Lord Reid and Lord Somervell of Harrow came to the conclusion that the Crown's appeal ought to be dismissed. It was throughout the case common ground that paragraph (*a*) of section 56 (1) deals with patients in institutions for mental defectives without referring to them as defectives on the basis that only a person who was in fact defective would be treated as a patient in them. The Attorney-General accordingly argued that, in a case where the presumption of defectiveness was rebutted by proof of the invalidity of the patient's detention, the prosecution could still succeed by showing that she was in fact a defective. The House of Lords rejected the argument, holding that evidence of care or treatment in an institution raised a presumption that the patient was lawfully detained as a defective, and Lord Tucker (with whose judgment Lord Reid and Lord Somervell of Harrow agreed) continued—

> " But the foundation for the presumption, in the case of a person under detention or on licence is the legality of the detention and the necessity for a licence to justify the patient's absence, and if it is shown and admitted, as in the present case, that on the face of the documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a prima facie case, but it is right and proper that the prosecution should have in court and make available for inspection by defending counsel the relevant orders or other documents upon which the detention is based so that in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted." [26]

It is not easy to follow the reasoning which led to this conclusion. The " whole basis of the subsection " is, not the legality of the woman's detention, but the fact that she is a mental defective. The best view, it has been suggested, is that section 56 (1) (*a*) merely obliges the prosecution to prove that the woman involved is in fact under care or treatment in an institution or on licence from it: in that case it would be immaterial that the order for her detention or the licence could be successfully impeached by her in other proceedings. There is also something (though, it is suggested, rather less) to be said for the view that section 56 (1) (*a*) requires the prosecution to prove the validity of her detention by production of the current order or licence: on that view it would be a good defence that the current order was bad on its face. What the majority of the House of Lords have held, however, is that the onus on the prosecution is proof that the woman was in fact a patient, but that the defence can succeed by showing that in law she ought not to have been.

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[26] [1958] 2 W.L.R. 617, at 626.

Consequences of the decision

It is only consistent with the paradoxical character of this situation that they should also construe the subsection as charging the prosecution with the duty of providing the material necessary to enable that defence to be established; and it is theoretically at least possible that an order successfully impeached in a prosecution under the Sexual Offences Act, 1956 (s. 8 of which has replaced s. 56 (1) (*a*) of the Mental Deficiency Act, 1913), would be upheld by the Divisional Court on an application for habeas corpus or certiorari. The practical effect of the decision is more difficult to assess. Viscount Simonds pointed out that—

> "As a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all 'the relevant documents' (whatever they may be) and, finding perchance a flaw in them, successfully plead that she was not lawfully detained, and that he therefore has committed no offence." [27]

The decision would appear to apply in principle to proceedings under section 324 of the Lunacy Act, 1890, which provides that it shall be an offence for a "manager, officer, nurse, attendant, or other person employed in any institution" to which the Act applies to have carnal knowledge of any female under care or treatment as a person of unsound mind. In this context its consequences might well be grave: first, because section 324 provides no defence of ignorance analogous to that contained in the proviso to section 56 (1) of the Mental Deficiency Act, 1913; second, because the persons at whom section 324 is directed are by the nature of their employment likely to be aware of both the mental condition of their patients and the legal validity of the orders for their detention. It is impossible to resist the conclusion that this result is repugnant alike to commonsense and the policy of the Acts dealing with the mentally ill.[28]

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[27] [1958] 2 W.L.R. 617, at 620. In practice, of course, the prosecution will, as a result of this decision, satisfy themselves before taking proceedings that the relevant orders are unimpeachable. The harmful effects of the decision will be mitigated by the current practice of encouraging defectives to enter institutions as voluntary patients, but it will of course continue to be necessary to detain both feeble-minded persons (who require supervision for their own protection) and moral defectives (who require it for the protection of others): see 108 L.J. 77.

It seems, then, unlikely that the decision in *D. P. P.* v. *Head* will do much to encourage those who believe that the right of appeal to the House of Lords in criminal cases should be extended; and the judgments delivered in the Court of Criminal Appeal must give rise to serious misgivings about the principles applied in the construction of what is not, it may be thought, a very complex enactment. The situation has, however, its brighter side, for the Home Secretary has already announced the Government's intention of introducing legislation to give effect to the recommendations of the Royal Commission on Mental Illness and it is to be assumed that the opportunity will be taken to render this branch of the criminal law both rational and effective.[29]

Murder and the Reasonable Man

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The recent case of *R.* v. *Ward* (1956) 40 Cr.App.R. 1 has aroused sharp controversy, and Mr. Prevezer has written an interesting and learned article with the rather startling title, " Murder by Mistake." [1] Of course, if A, intending to kill B, shoots at C, thinking him to be B, and kills C, he will certainly be guilty of murder. Suppose, however, that a physician happens to be drunk when attending a patient, and owing to his drunkenness injects into him a lethal dose of morphia instead of the recognised safe dose. Is he guilty of murder if no sober doctor would have made such a mistake?

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[28] The effects of the decision are the more serious because habeas corpus issues as of right even on the most unmeritorious technicality. See, for a recent example, *R.* v. *Metropolitan Police Commissioner, ex p. Melia* [1957] 1 W.L.R. 1065.

[29] 573 H.C. Deb. 99–100.

[1] [1956] Crim.L.R. 375. See also the criticism in 19 M.L.R. 414.

Disregarding any interpretation which may be placed upon *Ward's* case, surely the answer would be that he was not guilty of murder, although he might be guilty of manslaughter.[2]

Of course, to some extent, the criminal law must apply an objective test even in the serious crime of homicide. " The standard of the reasonable man," said Lord Macmillan, " eliminates the personal equation, and is independent of the idiosyncrasies of the particular individual whose conduct is in question." [3] Those who insist upon a purely subjective doctrine of *mens rea* would maintain that the personal equation is all-important, and is indeed the deciding factor. The criminal law has, however, not chosen to accept this theory, notably so in the case of provocation in homicide. The rejection of the objective test would, as Lord Cooper pointed out to the Royal Commission on Capital Punishment, lead to circumstances in which a bad tempered man might be acquitted and the good tempered man hanged, which is neither law nor sense.[4] In this connection the Commission observed:

> " It is a fundamental principle of the criminal law that it should be based on a generally accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed. Any departure from it might introduce a dangerous latitude into the law. Those idiosyncrasies of individual temperament or mentality that may make a man more easily provoked or violent in his response to provocation ought not, therefore, to affect his liability to conviction, although they may justify mitigation of punishment." [5]

The facts of Ward's case

What exactly were the facts in *Ward's* case? The medical evidence was to the effect that the skull of the deceased, a child of eighteen months, was fractured in two places, but that these fractures were not in themselves sufficient to cause death. Dr. Polson's opinion was that the child had died of asphyxia. In a letter to the *Criminal Law Review*[6] Det. Chief Inspector Byrne said that the transcript revealed that there were two depressed fractures of the skull caused, in the opinion of Dr. Polson, during life by a manual grip at the back of the head, forcing the face forward against a resisting surface. Further, the mother gave evidence that when she first saw the child after death it was bleeding from the side of the mouth and the mouth was bruised. There was a conflict of medical evidence, and the jury, having retired for three hours to consider its verdict, sent a note to the judge asking for elucidation of a passage in the summing-up. The judge repeated the passage, and the final form of his direction was:

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[2] In *R.* v. *St. Long John*, 4 C. & P. 398 Garrow B. said: " I am of opinion that if a person who has ever so much or so little skill sets my leg and does it as well as he can and does it badly he is excused; but suppose the person comes drunk and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution." In *R.* v. *Noakes*, 4 F. & F. 920 the prisoner, a chemist, put poisonous liniment into a medicine bottle instead of a liniment bottle, as a consequence of which a customer took it internally and died. The prisoner was charged with manslaughter and acquitted. There was no suggestion that he was guilty of murder.

[3] *Glasgow Corporation* v. *Muir* [1943] A.C. at 437.

[4] Command Paper 8932, para. 142.

[5] *Ibid.*, para. 143.

> "If, when the person did the act which he did, he must as a reasonable being have contemplated that death or serious bodily injury was likely to result, he is guilty of murder."

If the summing-up, as cited in the Court of Criminal Appeal, is carefully examined it will be seen that the trial judge put forward both a subjective and an objective test. Thus, in one place he is cited to have said:

> "In law a man is presumed to intend the natural consequences of his act, and if he, therefore, acts in a fashion which a reasonable man would contemplate that he would cause serious injury to the child, a child of eighteen months, and death results he is guilty of murder."

This was clearly an objective test, but he is also cited as saying:

> "But you have got to be satisfied about that, and satisfied from the evidence so that you can say 'We feel sure that *this man* must have contemplated in doing what he did that he would seriously injure the child,' and if you are satisfied about that, he is guilty of murder."

The test of the reasonable man

If the test of the so-called reasonable man is examined, it is apparent that in a sense it is still subjective. In any case of murder the jury has to deal with the operation of the mental faculties, and whether you direct it to the mind of the accused, or, on the other hand, to the mind of the reasonable man, you are directing it to a subjective test. The jury is looking into somebody's mind. It is important to appreciate exactly what does happen when the jury is directed to the analogy of the reasonable man. To borrow the words of Lord Radcliffe in a recent case,[7] the prisoner, thereupon, becomes a disembodied spirit, and in his place arises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who, after all, represents no more than the anthropomorphic conception of justice, is and must be the jury itself. The individual members of it will assume, in the absence of some convincing reason, that the accused was a person with a mind akin to his own, and will judge the reaction of the accused's mind in a given set of circumstances precisely in accordance with what his own mental reaction would have been in those circumstances. If each member of the jury would have foreseen the likelihood of death or grievous bodily harm as a result of the act, he will credit the accused with a similar foresight.

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[6] [1956] Crim.L.R. 580.

It is said that this objective method of treating the evidence may lead to injustice, because the accused, in fact, may not possess the foresight of the twelve men who try him. Of course, if such an argument is driven to its logical conclusion, then it seems to follow that Ward would have had a much better chance of acquittal on this objective test if the members of the jury had been gifted with intelligences precisely of the same quality as his own.

✓ The maxim that every man is presumed to intend the natural and probable consequences of his act has received a considerable amount of criticism from academic writers,[8] and much to their dissatisfaction judges still continue to quote it: it was indeed quoted by Pilcher J. in *Ward's* case. Stephen, with his usual acumen, observed of it "I do not think that the rule is a rule of law further or otherwise than it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequences of his conduct." [9] The rule has come under examination in a series of divorce cases in recent years, and so-called objective and subjective schools have arisen.[10]

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[7] *Davis Contractors, Ltd.* v. *Fareham U. D. C.* [1956] 2 All E.R. 145, at 160.

[8] See Salmond, *Jurisprudence* (10th ed.), 381; Glanville Williams, *Criminal Law*, para. 27; Dias and Hughes, *Jurisprudence*, 208.

[9] H.C.L. 11, at 111.

[10] See, *e.g.*, *Sickert* v. *Sickert* [1889] P. 278, at 284; *Buchler* v. *Buchler* [1947] 1 All E.R. 319, at 320–321 for the objective view; *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735, at 738–739, C.A., for the subjective view. Lord Merriman doubted whether there were two schools at all: *Simpson* v. *Simpson* [1951] 1 All E.R. 955, at 960. Certainly a point may be reached where the presumption becomes irrebuttable. In *Boyd* v. *Boyd* [1938] 4 All E.R. 181 Bucknill J. held that a husband was not in desertion when his wife refused to live with him after he had been imprisoned for an indecent assault upon a girl under the age of 13 on the ground that he did not intend to bring the cohabitation to an

Denning L.J., the chief exponent of the subjective school, like Stephen relegated the maxim to a presumption of common sense, and said that whilst it is reasonable to infer that a man does in fact foresee the results of his conduct, there is no " must " about it,[11] and his observation has found its way into the leading text-books on criminal law.

Now all consequences of an act are natural in their strictest sense, arising as they do from the operation of the inflexible laws of nature, but that does not mean that they are thereby intended, for the obvious reason that there may be no knowledge that the consequences will occur. If the consequence of an act is desired it is intended, however improbable the consequence may be thought to be. It is to be further observed that some consequences are so obvious as resulting from the act that the intention to bring them about is not only a natural presumption but the only presumption which can be drawn.[12] Such obvious consequences are usually

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end. This decision was criticised by Lord Merriman in *Edwards* v. *Edwards* [1948] 1 All E.R. 157, and in *Lewis* v. *Lewis* [1955] 3 All E.R 598 Willmer J. accepted that *Boyd* v. *Boyd* was wrongly decided.

In *Lang* v. *Lang* [1954] 3 All E.R. 571, P.C., it was pointed out that this controversy between the so-called subjective and objective schools was the result of failure to distinguish intention from desire, for to intend the consequences of an act is not necessarily to desire them. A person may intend to pursue a course of conduct whatever the consequences may be. In *Boyd's* case, for example, the husband intended to gratify his unnatural lust, although he may have hoped and desired that his wife would overlook it. Similarly, a husband may pursue a course of conduct which he knows is calculated to cause his wife to leave him, although he hopes and desires that his wife will remain with him. If he wishes his wife to remain with him, then surely the simple answer is that he should cease to behave in a manner which threatens to break off the consortium. To hold otherwise is to permit the husband to select between the consequences.

Whether this state of mind, where desire of the consequence is absent, is classed as intention or recklessness appears to be a mere matter of terminology. Neither Bentham (*Principles of Morals and Legislation*, Chap. VIII, para. vi) nor Austin (*Lectures on Jurisprudence*, Lecture XIX) held that desire of consequences was necessary to intention. Salmond's illustrations at p. 380 are not convincing ones. What if A, wishing to kill B, but not C, throws a hand-grenade at B and C, who are standing together talking, and is well aware that both B and C will most certainly be injured? Salmond argues that there is no generic conception which would include A's state of mind as regards B and C collectively. Many ethical writers would, however, not agree with this proposition. See, for example, Mackenzie, *Manual of Ethics*, at 53. It is suggested, with due respect, that to maintain that A, in the example given, did not intend to injure C is to fail to distinguish motive from intention. A certainly intended to injure C, although the injury of C formed no part of his motive.

[11] *Hosegood* v. *Hosegood*, *supra.*

[12] See, for example, on this point Glanville Williams, *Criminal Law*, para. 13; Dias and Hughes 206. It is to be observed that whether such consequences are inevitable is a question of evidence and not of law, but the

styled inevitable consequences and this principle of inevitable consequences operates in many fields of the criminal law. Thus it has been held to apply in malicious damage by fire,[13] corruption of public morals,[14] forgery with intent to defraud,[15] and sedition.[16] Whatever criticism may be levelled at the maxim it operates with deadly effect in the offence of murder, for the simple reason that the consequences flowing from an act of violence to the person are not in the category of the remote or probable but in the category

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further question arises as to whether such inevitability is, as a matter of law, to be decided by an objective or a subjective standard, and it is with this point that this article is concerned.

A difficult case upon this question of inevitable consequences is *R.* v. *Steane*, 32 Cr.App.R. 61, where the prisoner delivered broadcasts on behalf of Germany during the Second World War. He was charged under Reg. 2A of the Defence (General) Regulations, 1939, with doing an act likely to assist the enemy, with intent to assist the enemy. He pleaded in his defence that he was forced to broadcast under threats that if he did not do so, his wife and children would be placed in a concentration camp, and further that he did so to avoid ill treatment. The direction of the trial judge to the jury was: " A man is taken to intend the natural consequences of his acts. If, therefore, he does an act which is likely to assist the enemy it must be assumed that he did it with the intention of assisting the enemy." This direction was held by the Court of Criminal Appeal to be wrong, since there was no " must " about it. It was for the prosecution to prove the intent.

The material issues in this case surely were (i) whether the prisoner intentionally broadcast, and it is difficult to see how any person could deliver a broadcast unintentionally, unless he was totally unaware that his voice was being relayed by a mechanical apparatus, and (ii) whether he knew that the material in the broadcast would assist the enemy. In truth his defence was not that he did not intentionally assist the enemy, but that he did so under duress. He intended to assist the enemy because he did not wish either himself or his family to be harmed. Supposing that under similar threats he had been ordered to shoot down, in cold blood, an English prisoner of war, and had done so. Could it be seriously maintained that he did not shoot intentionally? Such shooting would certainly be murder if the prisoner's life alone was threatened. See 1 Hale 434 and see also the recent case of *R.* v. *Rossides* [1957] Crim.L.R. 813, where duress was rejected in a charge of murder.

R. v. *Steane* appears to say that an accused cannot act intentionally if he is forced to act intentionally, thus confusing voluntary with involuntary action. *Cf.* Stephen, 11 H.C.L. 102: " A criminal walking to execution is under compulsion, if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils." It may further be observed that the decision appears to confuse intention with motive, or the immediate intention of assisting the enemy with the remote intention of saving his family and himself. Certainly the prisoner had no motive of assisting the enemy, but that is entirely different from saying that he did not intend to assist the enemy.

[13] *R.* v. *Farrington* (1811) Russ. & Ry. 207, C.C.R.

[14] *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360.

[15] *R.* v. *Hill* (1838) 8 C. & P. 274, C.C.R.

[16] *R.* v. *Burdett* (1820) 4 B. & Ald. 95.

of the inevitable. He, for example, who shoots deliberately at another knows that the consequence will be grievous bodily harm or death.

The objective element in murder

The controversy in *Ward's* case raises the question as to what are the exact limits of the objective element in murder. Where does the objective element of the crime cease and the subjective element take control? Were the objective limits of the offence exceeded in *Ward's* case?

In an attempt to examine these questions a beginning may be made by observing that the wide interpretation given to the word " act " both by writers on jurisprudence and the exponents of the criminal law tends to obscure the objective element in murder and the application thereto of the inevitable consequence principle.[17] The common definition of malice aforethought, too, leads to a similar result, for inasmuch as this is usually defined as an intention either to kill or to inflict grievous bodily harm it immediately focuses the attention on the subjective element. In reality there are two intentions involved, namely an intentional act [18] and an ✓ intentional consequence of the act.[19] The element of subjectivity enters, of course, into the consideration as to whether the act in its narrower sense was intentional, but provided this issue is left to the jury a direction to the further issue as to whether the consequence was intended may become utterly unreal, so unreal, in fact, that the judge is entitled to withdraw that question from the jury altogether. The presumption that the accused intended the consequence of his act may be so strong as to become irrebuttable. The modern case of *R.* v. *Hedley* (31 Cr.App.R. 35), for example, affords an excellent illustration of this. The facts were that a number of persons committed a jewellery robbery and decamped in a motor-car. The deceased, one Captain Binney, placed himself in front of the car and waved his hands for it to stop. The accused, who was driving, drove on and ran over the deceased, as a result of which he received fatal injuries. The accused was charged with murder, and the trial judge directing the jury said "You have got to make up your minds whether the driver (assuming Hedley, *i.e.*, the accused, to be the driver) knocked down Captain Binney intentionally. If he did, my direction to you is that by the law of England he committed the crime of murder."

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[17] That is to say, an act is usually defined as including its consequences, thus in murder of including the final consequence of death. Thus, for example, Salmond says: " We habitually include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which the result is effected " (10th ed., *Jurisprudence*, at 370). Similarly, Glanville Williams analyses an act as consisting of (i) a willed movement, (ii) certain surrounding circumstances, and (iii) certain consequences (*Criminal Law*, para. 6).

[18] " An act is always a muscular contraction and nothing else " (Holmes, *The Common Law*, at 91). Similarly, Austin says: " The bodily movements which immediately follow our desires of them are the only human acts properly so called," at 419.

[19] This distinction is clearly brought out by Mr. J. W. C. Turner in *Modern Approach to Criminal Law*, 200.

Here it will be seen that no reference was made at all by the judge to any intention to kill or to cause grievous bodily harm: the consequence of the act was so obvious that the intention of the accused was manifest, assuming the act to have been intentional.

Intentional act

It is not surprising, therefore, that writers of authority have not been satisfied with definitions of *mens rea* based solely on intention to kill or to cause grievous bodily harm. But apart from the utter unreality of leaving as a question to the jury whether the accused intended the consequence when no other possible consequence could have resulted, there is a more obvious reason in that the definition based on intentional consequences takes no account at all of that attitude of mind characterised as recklessness. At what point should recklessness cease to reduce an offence from murder to manslaughter? Both Kenny and Stephen formulated a proposition. Kenny's fifth proposition was "Where the accused intends to do an act which is intrinsically likely to kill, though without any purpose of thereby inflicting any hurt whatever." [20] He was rather dubious, however, as to whether this was too wide, and quoted *Sterne's Case* (16 Cox 311). Stephen's proposition was "Knowledge that the act which causes death will probably cause the death of or grievous bodily harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused." [21]

Now the point about these propositions is that having propounded them Kenney and Stephen thought it worth while to propound any other proposition based on intention at all, for it is manifest that if an act of a certain quality amounts to the *mens rea* of murder when there is no intention either to kill or to hurt, then, *a fortiori*, it is certainly murder when there is, in fact, an intention to kill or to hurt. This seems to show that the *mens*

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[20] *Outlines of Criminal Law* (13th ed.), 137.

[21] H.C.L. III, 22, subsequently carried into his *Digest* and into Archbold (33rd ed.), 929.

rea can be defined purely in terms of the nature of the act, and that it consists of the intention to put such act into motion. Once it is set in motion, and it causes death, then whether the doer intended death or grievous bodily harm is completely immaterial, provided there was knowledge that the consequence would occur.[22]

These observations, it is suggested, show that it is possible to formulate some satisfactory definition of the requisite *mens rea* without entering into the problem of whether the consequence was intended or not. The *mens rea* can be found in the intentional performance of the act itself. In devising such a definition the following requisites must obviously be present:

1. There must be knowledge that the act is of such a quality as will cause death or grievous bodily harm, and
2. The act must be intentional.

The only difficulty about the first requisite is in fixing the degree of probability of death or grievous bodily harm. Kenny used the word " likely " and Stephen " probably." With all due respect it is suggested that these words are too vague, since likelihoods or probabilities might vary in strength. Is it not desirable that there should be some idea of inevitability here? Any formula should be such as clearly to differentiate between murder and manslaughter, and here it is thought that the principle of inevitable consequence should be invoked. A motorist who drives recklessly and realises that he *may* cause death is guilty of manslaughter, but he who realises that by his manner of driving he must inevitably cause death or grievous bodily harm is surely guilty of murder. A definition such as the following, it is suggested, would meet the case:

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[22] Stephen's first proposition was " an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not." The only difference between the first proposition and the second one quoted above is that knowledge that the consequence of death or grievous bodily harm will probably, or is likely to, occur has been substituted for an intention to bring either of those consequences about. In other words, foresight is equated with intention.

A similar dichotomy in the formulation of the *mens rea* of murder is made in Cross and Jones, *An Introduction to the Criminal Law* (3rd ed.), 249. Thus, in defining malice aforethought they say it consists of:

(i) An intention to kill or to cause grievous bodily harm, or,
(ii) An intention to do an act, which in circumstances known to him, the accused, is likely to kill or cause grievous bodily harm to any person.

What has been done here is, first of all, to state the intentional consequence as a form of the *mens rea*, and then to describe the nature of the act in which this intention must necessarily be expressed as an additional form of *mens rea*. This the authors are forced to do because the concept of recklessness must, in certain circumstances, constitute a form of *mens rea*. But is this dichotomy really necessary? Surely all that is necessary is to specify the type of act which must, *ex necessitate*, indicate either an intent to kill or to cause grievous bodily harm, or recklessness as to these consequences.

> "Malice aforethought exists where a person intentionally commits an act resulting in the death of any person, knowing that such act would necessarily cause death or grievous bodily harm to some person, whether such person is the person actually killed or not."

(*To be continued*)

Mr. Sutterthwick's Court

By A. E. JONES

Brothel keeping

The names of two defendants were called but only one stepped into the dock; the other had no body to imprison.

Mr. Dotwell got up from the solicitors' seat and said: "I am for the prosecution in this case, if it please you, sir. My learned friend, Mr. Forbes-Gale, appears for the accused Caroline Lowcher. and my learned friend, Mr. Bantingham, defends the company."

"We don't often have the pleasure of seeing you here in a case which doesn't involve motorists, Mr. Bantingham," said the magistrate.

"I trust that I shall not betray any inexperience in handling this brief, sir," said Mr. Bantingham.

Mr. Sutterthwick's "I'm sure you won't," was not just politeness.

Mr. Dotwell leaned over to Frell, the clerk, and whispered "There's a right of trial here."

"Caroline Lowcher," said Frell, "In your case certain facts may be proved which would give you the right to be tried by a jury at another court—the quarter sessions. If those facts are proved do you claim to be tried by a jury, or do you want to be tried by the magistrate at this court?"

To the magistrate this plainly said that the accused had been previously convicted of brothel keeping; and he wished that the law did not oblige it to be said before the trial.

"My client elects summary trial," said Mr. Forbes-Gale.

Mr. Sutterthwick looked down at the clerk and said: "Let's see, it's no longer essential that she should announce her election herself, is it?"

"No, sir. There's a High Court decision[1] now that if the defendant hears the advocate make the election and doesn't contradict it, it's perfectly valid," said Frell. He turned again to the accused and said: "You are charged with being in charge of premises which you knowingly permitted to be used as a brothel. Do you plead guilty or not guilty?"

"Not guilty," replied Caroline Lowcher and Mr. Forbes-Gale, almost simultaneously.

The nature of the charges

"I see there are two summonses against the company as the occupier of the premises—one for knowingly permitting them to be used as a brothel, and the other for knowingly permitting them to be used for the purposes of habitual prostitution. But there aren't two charges against this woman," said the magistrate.

"No, sir," said Mr. Dotwell, "In the case of a person in charge of premises the Sexual Offences Act, 1956, only makes it an offence to permit the premises to be used as a brothel. Apparently there's no offence committed by a person in charge who permits them to be used for habitual prostitution."

"I suppose it might constitute aiding and abetting the occupier in permitting the use?" said Mr. Sutterthwick.

"I did consider that possibility, sir. But, with respect, I felt that it would perhaps be going beyond the intention of the legislature if I put an additional charge of that nature against the female accused in these circumstances."

"Well, it's certainly not for me to conduct the prosecution," said Mr. Sutterthwick, "I suppose the company is contesting the case, Mr. Bantingham?"

"Yes, sir. There's a most strenuous plea of not guilty to both summonses."

"I feel I must open this case shortly to you, sir, as it's a little unusual in its facts," said Mr. Dotwell quickly, fearful lest magisterial impatience should spoil the orderly deployment of his carefully marshalled case. "If you will bear with me for a few moments before I call the evidence," he added, almost pleadingly.

"Very well," said Mr. Sutterthwick, somewhat reluctantly, "But, you will remember, Mr. Dotwell, that it was only a little over a week ago that I read the information on which the warrant was granted against this woman."

"Yes, sir, I realise that the allegations, so far as she is concerned, will be fresh in your mind. But the company has come into the picture since then, and you were good enough to grant me those summonses without a written or detailed information. Briefly, the case against the company is put in this way. They employed this woman Mrs. Lowcher, as caretaker of the premises at a weekly wage of £5; she lives there rent-free in the basement flat, and gets free lighting and heating as well. Each of the remaining three floors of the house is let as a furnished flat at a weekly rental. You will gather from the evidence that there is some doubt as to what these rentals are. The accused Lowcher said that £7 10s. a week was charged—which would not be unreasonable having regard to the locality and the nature of the accommodation. But one of the women tenants—a known prostitute—is alleged to have told the police, in the presence of the accused, that she paid £20 per week. That figure would, in my submission, only be demanded and paid on the basis that the flat was to be used for immoral purposes. It is significant, I suggest, that no rent books or rent receipts have been produced. The defendant Lowcher told the police, after her arrest, that she paid the rents collected to a Mrs. Thillikins who called every Friday; but again there is no documentary evidence as to the sums paid—at least none has been shown to the prosecution. Mrs. Thillikins is a widow getting on in years, and I shall call evidence to show that she and an elder sister—who is, I understand, bedridden—are the two directors of this company, and, indeed, the sole shareholders now. The company has been in existence for a number of years and seems to have been formed by the father of these two ladies to be the nominal owner of certain properties which he managed. The other properties appear to have been sold before the father's decease; and, so far as we know, the only income of his two daughters now is the dividends from this company. That means the profits on letting the premises which are the subject of this charge. Mrs. Thillikins has been interviewed by the police, and she has made a statement which I shall put in in due course; in it she also gives the rentals charged as £7 10s. per week. She goes on to say that she left the letting of the flats to the caretaker, and had no idea that the tenants were of the character alleged. On the other hand, the accused Lowcher said when charged—according to the prosecution's evidence: 'Mrs. Thillikins knew all that was going on and I don't see why I should take the rap for her.'"

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[1] *R.* v. *Salisbury and Amesbury JJ.* [1954] 2 Q.B. 142.

"That isn't evidence against Mrs. Thillikins, of course," interrupted Mr. Bantingham with some asperity.

"No, sir, and Mrs. Thillikins isn't charged," replied Mr. Dotwell. "But it is evidence against the company, I submit, in view of the duties apparently delegated to Caroline Lowcher as their servant."

"I should perhaps say, sir, that my client will deny ever having used any such words," said Mr. Forbes-Gale.

"We haven't got anywhere near that stage, yet. We're still on the opening," said Mr. Sutterthwick.

"I have all but finished, sir," said Mr. Dotwell placatingly. "There is little that I need say concerning the evidence against the accused Lowcher. Two of the women seen to use flats at the premises are known to the police as prostitutes. The evidence of the observation which you will hear shows that on some occasions these women were seen to successfully solicit men in the High Street nearby, and then take them to the premises. The third woman using the house appears to be what is, I believe, known as a 'call girl' and she very rarely came to the premises with a man, though numerous men were seen to visit her there and leave after a comparatively short interval. The police also rang the telephone number of the house, which, together with the name 'Sandra,' was given in an alluringly ambiguous advertisement displayed on a board outside a local shop. The person answering the telephone—who, there is reason to believe, was the caretaker, Caroline Lowcher—said that 'Sandra' had gone away, but 'Yvonne' had taken over her personal service agency, and would she do instead? The speaker added that Yvonne was a very nice young lady; and the police then rang off."

"I shall object to the admissibility of that conversation, unless there is definite evidence linking it with my client," said Mr. Forbes-Gale. "She can't be held responsible for everything said on the telephone at the address, surely."

"I think it's admissible, at any rate, to show the character of the premises, isn't it?" said Mr. Sutterthwick.

"As long as it isn't put as evidence of my client's knowledge. . . ."

"That you must judge, sir, when you hear the evidence," said Mr. Dotwell. "I should add that the defendant Lowcher has been seen on a number of occasions to admit couples consisting of one of the known prostitutes and a strange man; and she almost invariably answered the door to men who subsequently went to Sandra's flat—or Yvonne's, whichever it is. I think the evidence will satisfy you, sir, that the defendant must have been perfectly well aware what sort of life these women were leading, and that she was not merely taking no steps to stop them, but was actually assisting them in using the place as a brothel. . . . Before calling the police evidence I propose putting into the box an officer of the

Registrar of Companies who will give evidence about the defendant company and its directors; and, after him, there will be someone from the Town Hall to produce the rate book showing that the company is the rated occupier of the premises."

Evidence for the prosecution

The two formal witnesses mentioned by Mr. Dotwell duly gave their testimony and were promptly permitted to return with their precious archives to their official duties—after the magistrate had ascertained that no one in the case was likely to want them recalled.

Then came the evidence of a police sergeant and a constable who had kept observation on the premises for four days. Mr. Dotwell had an advantage over most advocates here in that he could be sure of his witnesses coming up to proof—since his proofs were merely an expanded version of what was in the police note-books and the officers had to refer so often to these, in order to "refresh their memories," that it was almost a legal fiction to say that the witnesses were not reading out their evidence. So certain was Mr. Dotwell of his ground that he had no hesitation in suggesting to the officers that they had either misread their notes or lost the place, whenever they said something which was at variance with the typed version in his hand.

As the clerk toiled at his note he reflected on the labour that could be saved by a rubber stamp. All that was needed was a series of impressions of one reading "At — p.m. I saw the woman lettered A, B, C (delete as necessary) in my observation enter the premises with the man she had solicited; shortly afterwards the light went on in the ground, first, second (delete as necessary) floor flat, and I saw them both moving about in the bedroom until the curtains were drawn. The couple had been admitted by the defendant Lowcher, whom I have designated X in my notes (delete as necessary). At — p.m. the man left. He was let out by X (delete as necessary). At — p.m. the woman A, B, C (delete as necessary) left and began accosting men again in High Street. At — p.m. she successfully solicited a man."

Frell's handwritten note with its abbreviations and recurrent references to A, B, C and X looked rather like algebra, he felt: and, while one part of his mind was attending to the mechanical task of recording what was said, another part found itself formulating problems such as: if A plus a man equals 23 minutes and B plus a man equals 31 minutes is X squared?

All that Mr. Bantingham required to obtain from the officers in cross-examination was that they had never seen Mrs. Thillikins at or near the premises during the observation. On Mr. Forbes-Gale fell a much more difficult task—in fact, almost a conjuring trick—that of making Mrs. Lowcher disappear from every incriminating incident. But all his verbal magic failed to convince either the sergeant or the constable that their notes had erred in stating that the defendant had been seen admitting couples now and then, letting out men at other times, and even chatting at the door with A or B as they went forth on their unlawful occasions. Counsel had to be satisfied with establishing that the police were watching most of the time, from a parked car in which they had to contrive to see without being seen.

The last witness for the prosecution was a police superintendent who, armed with a warrant and attended by a uniformed retinue which included the previous officers, invaded the house at an ill-chosen hour from the point of view of its occupants. By the time the police had reached the first floor C was taking leave of a man at the flat door. He looked somewhat dishevelled but asserted that the purpose of his visit was to take the young lady to dinner. Seemingly, the sight of the police spoilt his appetite for he left hurriedly without waiting for his companion. The superintendent's inventory of what was found in her bedroom fully supported the prosecution's suggestion that C was a prostitute. A was out, but her flat proved to be equipped with articles similar to those taken from C's flat.

Sounds from below apparently did not penetrate B's flat on the second floor. She and a man were discovered still on a bed in a situation and state of undress which seemed incapable of platonic explanation. However, to make quite sure, the superintendent inquired: " What are you doing with this woman? " and received the reply, " It's pretty obvious, isn't it, and now you've gone and spoilt it."

So far as Mrs. Lowcher was concerned, the police made this a conducted tour of the premises, and all the noteworthy sights were pointed out to her; but, according to the superintendent, she made no comment and evinced no surprise. His account of an interview with Mrs. Thillikins and the production of her signed statement, concluded the superintendent's examination in chief.

There was no cross-examination by Mr. Bantingham, but Mr. Forbes-Gale was obliged by the rules of advocacy to suggest that the superintendent was quite mistaken about the defendant's reactions to what she saw and heard on the night of the " raid," and also about her reply when formally charged. Having made his challenge in due form, counsel prudently refrained from wasting ammunition on a grand-scale attack on such an impregnable fortress, and the superintendent retired in good order from the witness-box. "That concludes the prosecution's case, sir," said Mr. Dotwell.

"I have a submission to make that my client has no case to answer, sir," announced Mr. Forbes-Gale.

"I have a similar submission to make on behalf of the company," said Mr. Bantingham.

The legal battle

For the next thirty minutes a battle of cases raged in the courtroom, with volumes of law reports as the weapons. Counsel for Mrs. Lowcher derived his argument basically from the decision in *Singleton* v. *Ellison*[2] that premises used by one prostitute only are not, in law, a brothel. In the present case, he contended, each flat constituted separate premises, and there was no evidence that any flat was used by more than one prostitute. The facts, said Mr. Forbes-Gale, were on all fours with those in *Strath* v. *Foxon*,[3] where flats in a building were separately let to prostitutes and it was held that the landlord's agent was rightly acquitted of letting them for use as a brothel.

Mr. Dotwell put forward *Durose* v. *Wilson*[4] as providing a much better indication of the law's attitude to Caroline Lowcher's position. In *Durose* v. *Wilson*, he pointed out, prostitutes brought men to a block of flats in which they were tenants and they were admitted by the porter; the High Court held that there was evidence to justify the magistrate's finding that the premises were a brothel. "The female defendant in this case is exactly in the same position as the porter in that case," was Mr. Dotwell's conclusion. Mr. Forbes-Gale, however, disagreed vigorously. "My friend has overlooked two vital points of difference," he countered. "In *Durose* v. *Wilson* the prostitutes had no street-door key and so were, to a certain extent, under the control of the porter. From the police evidence in this case it is clear that each woman tenant had a street-door key and used it—even although Mrs. Lowcher may have obligingly opened the door for them on occasion—as any caretaker might. Furthermore, in *Durose* v. *Wilson* there was no evidence as to whether each woman used only her own flat for prostitution, and consequently it was held that the magistrate was entitled to infer an indiscriminate use of the flats. But the police observation on A, B and C in this case shows that the light went on in the appropriate flat each time they are alleged to have entered with a man."

Mr. Dotwell had only *Durose* v. *Wilson* to advance against

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[2] [1895] 1 Q.B. 607.

[3] [1956] 1 Q.B. 67.

[4] (1907) 71 J.P. 263.

Mr. Forbes-Gale, but against Mr. Bantingham he had at his disposal quite a platoon of cases bearing on the criminal liability of a master for the acts of a servant. *Allen* v. *Whitehead*[5] was the spearhead of his attack to establish that where, as in this case, a servant had permitted misconduct on premises the management of which had been entrusted to her, the employer could be convicted of the offence in question. Mr. Bantingham, however, sought to distinguish the position of a limited company which must always act by agents and so would be unfairly treated, in his submission, if made criminally liable for the misbehaviour of all its servants, however humble and irresponsible. He pointed out that on the charge made against his client *mens rea* was required and the matter was not just one of an absolute statutory prohibition as it was in the cases cited by Mr. Dotwell. In this connection he made great play with *Mousell Bros.* v. *L. & N. W. Ry.*[6] and, with impressive emphasis, quoted what Lord Reading in that case had quoted from a judgment of Channell J.'s in *Pearks Gunston & Co.* v. *Ward.*[7]

Mr. Sutterthwick's conclusions

Legal argument came to an end at last, and it was left to Mr. Sutterthwick to reach a decision. He reflected for a few moments and then said: " Are you calling any evidence, Mr. Bantingham? "

" No, sir. I don't feel I can produce any witnesses who would help you. You have before you the statement Mrs. Thillikins made to the police, in which she says, in effect, that she trusted the caretaker, Mrs. Lowcher, and had no idea that any misuse of the premises was taking place. There is nothing she could add to that. That is our case—that we knew nothing of what was going on."

The assistant gaoler motioned Caroline Lowcher to her feet as Mr. Sutterthwick said: " I've come to the conclusion that I must dismiss the charge against the defendant in the dock. There's no evidence from which I could infer indiscriminate use by prostitutes of the three flats in the building of which she was the caretaker. I can't infer, either, that her opening the street door for the prostitutes was an exercise of control over them; it would equally indicate that she acted occasionally as a sort of maid to them. In my view she cannot be considered to be the person in charge of these three flats because I'm satisfied that, whatever the rents charged may have been, there were genuine tenancies. . . . You may go, Caroline Lowcher; I find that this was not a brothel. That disposes of the first summons against the company, but not the one alleging that it knowingly permitted the premises to be used for the purposes of habitual prostitution. There is abundant evidence that Mrs. Lowcher did just that, and I hold that she was acting for the company in so doing. There is, in addition, some evidence that Mrs. Thillikins, a director of the company, knew what was going on. I find that there is a case for the company to answer, Mr. Bantingham. Do you wish to address me any further?"

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[5] [1930] 1 K.B. 211.

[6] [1917] 2 K.B. 836.

[7] (1880) 5 App.Cas. 714.

"No, sir. I cannot usefully say anything on the facts as disclosed by the prosecution's evidence because our case is that we have no knowledge of them. My defence rests purely on law; but, with regard to that, I must say, with respect, that the alleged statement of a mere caretaker employed by the company surely cannot be evidence of what a director knew. There is nothing else I have to say at this stage, but, if you convict the company, I would ask you to state a case, sir."

"Certainly, if you can find a point of law that hasn't been decided already," said Mr. Sutterthwick. "I do convict the company on the second summons. I suppose, Mr. Dotwell, there's nothing more known about the company beyond what I've heard already?"

"No, sir. You've had all the facts in our possession—though we have our suspicions in addition, I need hardly say. The cost of the police observation was £5 14s. 6d. and I would respectfully ask for professional costs in your discretion."

"The company must pay a fine of £30 and 15 guineas costs," announced the magistrate.

Mr. Forbes-Gale got to his feet and Mr. Sutterthwick said: "I think I know what you're going to say and I'm afraid the answer is 'no.'"

"I would ask you to consider, sir, the humble financial status of my client and also the fact that she has been acquitted because you have held that the prosecution could not even establish a case for her to answer," persisted counsel.

"Yes, she was certainly not acquitted on her merits. No; no costs against the prosecution, Mr. Forbes-Gale."

"As you please, sir," said counsel resignedly.

"My learned friends and I are much obliged to you, for setting aside the afternoon for the hearing of this case," said Mr. Dotwell.

A nicely dressed woman with carefully tended white hair and a rather smug expression left the court-room to pay the sums ordered.

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A. E. Jones
1958

Mistake as to Quantity in the Law of Larceny

By Glanville Williams, LL.D., *Barrister-at-Law*

(*continued from p.* 232)

The thesis so far may be simply summarised. Although a mistake of identity vitiates consent for the purpose of the law of larceny, a mistake of quantity in effect does not do so if the individual items making up the quantity are indistinguishable from each other. This is because of the rule that larceny must relate to a specific thing. It is now time to turn to the authorities, to see how far they accord with the conclusion reached on point of principle.

The only case in which the point was specifically argued and considered is *Tideswell* [1905] 2 K.B. 273. The facts were that D was in the habit of buying ashes from P at so much a ton, D being at liberty to take as much as he required, upon the understanding that the amount of his purchase should be weighed by P's weigher. The weigher, by tacit agreement with D, and in return for various bribes, delivered to D 32 tons 13 cwt. of ashes but entered the weight in the book as 31 tons 3 cwt. only. It was held by the Court for Crown Cases Reserved that on these facts D was rightly convicted of larceny of 1 ton 10 cwt.

Two points were pressed upon the court by counsel for the defendant. The first was that discussed in this article, that P was deprived not of a certain quantity of goods, but only of part of the price. The second was that D did not develop the *animus furandi* until after he had obtained property in the goods. Both arguments were rejected. It is disappointing that the judgments do not contain a single word on the merits of the first argument, and no authority is quoted to suggest that there can be larceny of an unidentifiable part of a larger whole. The judgments devote themselves only to inquiring whether the property in the whole had passed to D before the weighing. Since it clearly had not, the judges assumed without more that there was a larceny.

There was certainly no need to convict Tideswell of larceny in order to bring him within the reach of the criminal law. He was guilty of conspiring with the weigher to defraud the prosecutor, and also of bribery.

Middleton's case

In certain other cases the facts raised the point of law considered in this article, but it passed unnoticed. The first and best known of these cases is *Middleton* (1873) L.R. 2 C.C.R. 38. It will be remembered that the accused person, having a right to withdraw 10s. from his Post Office Savings Bank account, was given by the clerk the sum of £8 16s. 10d., made up of a £5 note, three sovereigns, a half-sovereign, and silver and copper. The clerk had made a mistake by consulting the wrong letter of advice, which referred to another depositor, and the accused took up the sum knowing of the mistake. He was held guilty of larceny. The present discussion is concerned only with the ground taken by seven judges (Cockburn C.J. and others) that the clerk's mistake prevented property from passing. Two questions arise as to this decision. First, what was the legal nature of the clerk's mistake? Secondly, does the decision contradict the proposition that to justify a conviction for larceny all the elements of larceny must be present in respect of a specific thing?

It may be thought at first sight that the clerk's mistake can be classified in either of two ways: either as a mistake of quantity, or as a mistake of identity of the recipient. On further consideration, however, it will be seen that it was not a mistake of quantity in the sense in which that expression is used in this article. The clerk did not make a mistake as to the amount of money that he handed to the defendant, for he knew this amount perfectly well. His mistake was as to the amount that he ought to hand over, caused by consulting the wrong letter of advice, and it was also as to the identity of the accused. The material mistake for the purpose of the decision was the latter. That the vitiating mistake was the mistake of identity seems to be shown by certain passages in the judgments of some of the majority judges (L.R. 2 C.C.R. at 48, 51).

Granting that the clerk's consent to transfer the money was vitiated by his mistake as to the identity of the recipient (a proposition which, incidentally, seems to involve a denial of the controverted *ratio decidendi* of *Phillips* v. *Brooks* [1919] 2 K.B. 243), the question remains whether the accused was properly convicted of larceny. The accused person was entitled to the sum of 10s., and among the money paid out to him was a half-sovereign. Yet the conviction was in respect of the whole sum received, including the half-sovereign. It is submitted that this was an error. Although the indictment was not vitiated by stating an excessive sum,[1] the conviction should have been for stealing £8 6s. 10d. only, for as regards the half-sovereign the accused had not merely a claim of right to it but an actual right.

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[1] Archbold, 33rd ed., § 95.

The point can be made more obvious if we alter the figures. Suppose that the accused had been entitled to draw £100, and had been paid £100 1s. 0d. It would be manifestly unjust to record a conviction against him for stealing the whole sum, even though the punishment were fixed on the basis that his dishonesty had extended only to the shilling. The court has no right to record a conviction against a man that does not reflect the true facts of the case. Such a conviction as that imagined might seriously prejudice him in later life, when a conviction stating the true facts would not.

No further difficulty arises on the actual facts of *Middleton's* case, because it so happened that there was only one half-sovereign among the money given to him, so that no doubt could arise as to the coin to which he was really entitled. But the facts might well have been different: there might have been two half-sovereigns included. In that case, it is submitted that the prosecution should have omitted both half-sovereigns from the indictment, for neither could be said beyond a doubt to be something in respect of which an effective consent had not been given by the clerk. We need not shrink from the conclusion that if the payment had consisted entirely of half-sovereigns, Middleton should not legally have been convicted of anything.

This result may be thought to be a *reductio ad absurdum* of the whole argument. Those who support the decision in *Middleton* in its entirety may say that having regard to the clerk's mistake the accused was not entitled to any part of what he received. Owing to the clerk's mistake of identity he presumably debited an entirely different depositor with the money paid out; consequently, the accused still had a credit of 10s. showing in his account, which he might have returned to draw out. Consequently, it was not unfair to him to say that he was guilty of larceny of the whole sum drawn out. But it may be replied that this argument is fallacious, for the accused did not in law retain a credit of 10s., whatever the books of the Post Office might show. Had he afterwards returned to withdraw 10s., he might well have been convicted of obtaining this sum by false pretences, even though a credit of 10s. was shown in his pass book. When the clerk handed Middleton the half-sovereign, the property passed in it, because although the clerk mistook Middleton's identity, the mistake was not a material one as to this half-sovereign; it was material only as to money to which Middleton was not entitled. It follows that Middleton should not have been convicted of larceny except in respect of coins and notes as regards which it could be said for a certainty that they were not those to which he was entitled. The authority of the decision is not against this view, because the point was not argued.

Moynes v. *Coopper*

This aspect of the problem did not arise in the more recent case of *Moynes* v. *Coopper* [1956] Crim.L.R. 268; [1956] 1 Q.B. 439, where *Middleton* was followed. It will be remembered that the facts were that a wages clerk handed the defendant a packet containing £7 3s. 4d., believing that that was the amount due to him, when in fact the amount due was only 3s. 9½d. The defendant discovered the mistake later in the day, when he opened the packet. In the Divisional Court, the defendant was acquitted under the doctrine of possession, since he had no *animus furandi* at the time of the taking. In the court below (quarter sessions), he had been acquitted on a different ground, namely that the clerk's consent was not vitiated by mistake. There was no mistake as to the identity or quantity of what was in the packet, or as to the identity of the defendant; the only mistake was as to a motivating fact, because the clerk did not realise that the defendant had already received an advance on his wages. A mistake of this character does not vitiate consent in the civil law, so as to prevent property from passing; and since property passed, there could be no larceny.[2] It is respectfully submitted that this opinion of the Chairman of the Quarter Sessions Appeal Committee was correct, and put an end to all other aspects of the case. Had it been held that the consent was vitiated, and that the defendant conceived the *animus furandi* at the moment of taking, a further question would have arisen, namely as to the defendant's right to the sum of 3s. 9½d. It is submitted that he could not in any event have been convicted of stealing coins to which he might be entitled in respect of this debt.

Russell v. *Smith*

Moynes v. *Coopper* was distinguished in *Russell* v. *Smith* [1957] Crim.L.R. 610; [1957] 3 W.L.R. 515, where the problem considered in this article was directly in point, though it was not perceived. The defendant was a lorry driver who was instructed by his employers, a firm of haulage contractors, to collect one ton of feeding stuffs from P. By an error on P.'s part, eight sacks too many were loaded on to the lorry. When unloading the lorry, the defendant discovered the error and decided to keep the extra sacks for himself. The defendant was charged with stealing eight sacks, the property of P.

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[2] See the remarks of Professor J. C. Smith, "Larceny by Finding Out" [1956] Crim.L.R. 516.

It was held by the Divisional Court that the defendant was guilty of larceny as charged. Since he did not know how many sacks he had until he came to unload them, he did not "take" them till that moment, at which time he had the *animus furandi*.

The Divisional Court purported to distinguish the case from *Moynes* v. *Coopper*, but a reading of the judgment leaves one without enlightenment on what this distinction was. Lord Goddard's remark: "I do not think that a man can take into his possession, or come into possession of, a thing of which he has no knowledge," is in direct contradiction to his judgment in *Moynes* v. *Coopper*, where the learned Chief Justice found that the defendant "did not know of the mistake when he took the money, so the taking was not *animo furandi*." However this may be, the problem of "taking" is not our present concern. Implicit in the decision in *Russell* v. *Smith* is another proposition, that a person may be convicted of stealing part of a quantity which, by mistake, is excessive. The accused was convicted of stealing eight sacks, the property of P, and on traditional reasoning (if the question of P's mistake were regarded as relevant) it would seem to be necessary to show that the eight sacks the defendant took were the very sacks that were added to the consignment by mistake. Clearly such a proof was impossible in the circumstances, since the sacks were indistinguishable from one another and were all delivered together. Even if one were to assume that the sacks were unloaded from the lorry in the same order as that in which they were placed on, the result could only be to demonstrate that the sacks taken by the accused were not those in respect of which the mistake was made. As has already been pointed out by an anonymous commentator in this *Review* ([1957] Crim.L.R. 610), the accused was apparently convicted of stealing eight sacks which were left when the rest had been unloaded: yet these eight sacks were presumably the first sacks to be loaded and therefore not those in respect of which the error was made.

It is submitted that there was a much simpler road to the conviction for larceny than that adopted in the case. *Russell* v. *Smith* was not a case where the accused had a claim of right, much less an actual right, to any of the sacks. Why, then, should he not have been convicted on the charge, simply on the ground that he was guilty of larceny as a bailee? It is settled that when a servant obtains goods from a third party in the course of his employment, the doctrine of the servant's custody does not normally apply, and the servant obtains possession. The third party must therefore be a bailor to the servant, and the servant a bailee. A bailment is any delivery (voluntary transfer of possession) of goods on condition that they be restored to the bailor or according to his direction. In

Russell v. *Smith*, the goods were delivered to the defendant merely as a haulier, for ultimate delivery to a purchaser. Hence the defendant was a bailee. He was a bailee of all the sacks delivered to him, notwithstanding the mistake in counting, since it was not intended that he should keep any for himself. He would, therefore, have been guilty of larceny as a bailee whether he kept eight sacks or eighteen. If he had kept eighteen sacks, he could not have been convicted of larceny of all eighteen on the reasoning adopted by the Divisional Court; but clearly he would have been guilty of some crime, and it is submitted that that crime is larceny by a bailee.

Another way of deciding the case would be to say that as between himself and his employers the defendant merely had custody of the goods, since they were placed on his employers' lorry, of which the defendant merely had custody ([1957] Crim.L.R. 611). The application of this doctrine would mean that the larceny was not from the firm from whom the defendant received the sacks (in whom the information laid the property), but was from the defendant's employers. It may be noticed that acceptance of this doctrine does not necessarily involve rejection of the theory that the defendant was guilty of larceny as a bailee. The doctrine of possession in larceny is now in such a state that it is legally possible to say that a servant is in possession for one purpose but not for another—in possession *vis-à-vis* the third party as bailor, but only in custody as between himself and his employers.

Conclusions

The principal conclusions from this discussion may be summarised as follows.

(1) When a person delivers goods under some mistake, his mistake merely as to a motivating fact does not vitiate his consent to part with possession. It is submitted that the decision of the Quarter Sessions on this point in *Moynes* v. *Coopper* is good law, notwithstanding that the Divisional Court rested its judgment on a different ground. Consequently, if the deliveror knows the quantity of goods that he is delivering to the accused, the mere fact that he mistakes the amount to which the accused is entitled does not vitiate his consent, and the accused cannot be convicted of larceny under the doctrine of vitiation of consent. He may, however, in some circumstances, be convicted of larceny as a bailee, as where the accused is intended merely to carry the goods.

(2) Mistake as to the quantity of goods (or money) delivered will vitiate the consent, provided that one can in theory put one's finger upon the very goods that are subject to the mistake and so excessive; the consent is vitiated only as to this excess. Before

the accused can be convicted of larceny of this excess quantity, it must be shown that all the elements of larceny are present in respect of this excess. This proposition is clear on principle ; *Tideswell* is against it, but no reason is there given or relevant authority quoted, and it is submitted that *Tideswell* could well be reconsidered by a full court of the Court of Criminal Appeal. The point passed unnoticed in *Middleton* and in *Russell* v. *Smith*, and it is submitted that these decisions should not control the issue if it is brought before the court in a future case.

It need hardly be added that the one really satisfactory solution of all the problems would be a legislative redefinition of offences of dishonest appropriation.,

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Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* HENDRY, the court (Lord Goddard C.J., Devlin and Pearson JJ.: November 25, 1957) reduced a sentence of fifteen months' imprisonment to one of six months'. H. had pleaded guilty at assizes to bigamy. H., who was a man of twenty-eight years of age, had previously been on probation for housebreaking and had been fined for taking and driving away a car without the owner's consent but otherwise had a good record in his employment. The court stated that the real crime in the present case was that of falsifying a public document because H. had described himself as a single man. Apart from that, no great harm had been done. The marriage with the legal wife had broken up so that no harm had been done to her, and the second girl had permitted intercourse before marriage and now wished to remain with the appellant. It was not a case that called for severe punishment and six months' imprisonment was appropriate.

In R. *v.* NEWLAND, the court (Lord Goddard C.J., Devlin and Pearson J.J.: November 28, 1957) reduced a sentence of eighteen months' imprisonment to one of twelve months'. N., with two others, had been convicted at quarter sessions of taking and driving away a car and of attempted larceny. N., who was a man of twenty-two years of age, had one previous conviction when he was conditionally discharged in 1955 for taking and driving away a car, driving whilst uninsured and being an absentee from the army. The court stated that, in view of the fact that it was N.'s second offence and that he had not previously had a prison sentence or been put on probation, the sentence would be reduced to one of twelve months' imprisonment.

In R. *v*. BARNES, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 18, 1957) reduced a sentence of three years' imprisonment to one which would permit immediate discharge. B. had pleaded guilty at assizes to manslaughter. B., who was a man of thirty-two years of age, had nine previous convictions. He had been put on probation twice, fined five times, given a conditional discharge once, and only on the last occasion was he given a sentence of imprisonment, namely, nine months' for two shopbreakings. The present offence, committed while B. was serving his sentence of imprisonment, arose out of a fight with a fellow prisoner in prison. The fellow prisoner fractured his skull in falling and died from cerebral haemorrhage. The court stated that, whilst fighting was not to be tolerated in prison, there ought to be a very considerable reduction in the sentence. As the appellant would have been discharged from prison last June and had been in custody until the hearing, the court thought that the six months which, in effect, was what he had served was a sufficient punishment; the appropriate sentence was one which would permit B. to be discharged immediately.

In R. *v*. DOCHERTY, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 19, 1957) reduced a sentence of two years' imprisonment to one of twelve months' imprisonment. D. had pleaded guilty at quarter sessions to housebreaking and larceny. D., who was a man of thirty-seven years of age, had a bad record up to 1947 when he promised thereafter to behave himself. Apart from a conviction for indecent exposure in 1954, for which he had been sentenced to six weeks' imprisonment, there was no further conviction until the present offence. This offence was committed when he entered a hotel where he had once been employd. He was seen in a corridor and ran away, leaving his wet shoes in the bathroom. When caught he was found to have an article of clothing which had been stolen from the hotel. The court stated that this was an offence which clearly merited a prison sentence but that two years was unnecessarily long; the appropriate sentence was twelve months' imprisonment.

In R. *v*. PALMER, the court (Lord Goddard C.J., Cassels and Barry JJ.: February 3, 1958) reduced a sentence of ten years' preventive detention for bigamy to one of twelve months' imprisonment. P., who was a man of thirty-six years of age, had pleaded guilty at assizes to a charge of bigamy. He had eight previous convictions of serious crime. The court stated that the present offence was not of a particularly serious character and that P.'s previous offences had no relation whatever to bigamy. There was no reason to suppose that he had inflicted any wrong upon his lawful wife because she had gone off and lived with another man and his " second wife " seemed to be willing to stand by him. In the circumstances the sentence of ten years' preventive detention would be set aside and a sentence of twelve months' imprisonment would be substituted.

In R. *v*. SMITH, the court (Lord Goddard C.J., Cassels and Barry JJ.: February 3, 1958) reduced a sentence of seven years' imprisonment to one of eighteen months' imprisonment. S., who was a man of sixty-one years of age, had been found guilty of manslaughter at assizes. S. had no previous convictions and had a good reputation both as a worker and as a family man. The circumstances of the offence were that S. met a prostitute on a racecourse, had intercourse with her and, in the course of an argument, gripped her by the throat as a result of which she died. S. was acquitted of murder. The court stated that S. clearly did not intend to kill and the jury had been satisfied of that. The offence could not be overlooked because S. had admitted he knew there was some danger in catching the woman by the throat. S. had hitherto borne an excellent character and the death was caused more by bad luck than anything else. The sentence would be reduced to eighteen months' imprisonment.

In R. *v*. MILLS AND OTHERS, the court (Cassels, Slade and Havers JJ.: February 24, 1958) reduced sentences of eight years' imprisonment passed on each of three men to sentences of four years' imprisonment. M. and two others, two of whom were twenty-one years of age and one twenty-two, had been convicted at the Central Criminal Court of two offences of wounding with intent. The appellants had eight, six and three previous convictions respectively and each of them had been sentenced, *inter alia*, to training at an approved school. The present offences arose out of a fight outside a public-house when two men were seriously injured by stab wounds. The court stated that by reason of the age of these young men who were only just on the threshold of manhood and in spite of the grave offences of which they had been found guilty and the serious consequences to the victims, the sentences could properly be reduced to four years' imprisonment in each case.

Preventive detention

In R. *v.* EJGIRD, the court (Lord Goddard C.J., Hilbery and Salmon JJ.: January 14, 1958) reduced a sentence of eight years' preventive detention to a bind over to be of good behaviour for two years. E. had been convicted at quarter sessions of stealing a pair of boots. E., who was a man of forty-five years of age, had nine previous convictions and had served two sentences of eighteen months' imprisonment, one of three years' corrective training and two of two years' imprisonment. The present offence was committed when the appellant, who had been drinking in a public-house, took the boots from the carrier of a bicycle and carried them back to his lodgings. The boots were found in the locker of another man at the lodgings. The court stated that they had received a letter from E.'s employers which stated that he had worked well and that they were prepared to employ him again. The court could well understand quarter sessions regarding this as a case for preventive detention, but, as there seemed no doubt that E. committed this very petty theft when under the influence of drink, the court was taking a chance by binding E. over for a period of two years. If E. did any criminal act in the next two years he would be sentenced to a long term of preventive detention.

In R. *v.* TAYLOR, the court (Cassels, Streatfeild and Slade JJ.: February 10, 1958) reduced a sentence of ten years' preventive detention to one of seven years' preventive detention. T., who was a man of sixty-eight years of age, had pleaded guilty at assizes to indecent assaults on two boys aged thirteen and fifteen and, on another indictment, to gross indecency with a young man aged twenty. T. had five previous convictions, four of which were in respect of offences of indecency. He had been previously sentenced to four-and-a-half years' penal servitude in 1938 for attempted buggery (four similar offences being taken into consideration), four years' penal servitude in 1943 for indecent assault on boys and ten years' imprisonment in 1950 for five offences of indecent assault on boys. The court stated that the sole reason for reconsidering this sentence was T.'s age. The court did not wish such a sentence of preventive detention to be imposed on an old man as would almost of necessity mean that he would die in prison. Bad as this case was, wicked as this man was, essential as it was that he should have no more opportunities of meeting young boys, it was right to reduce the sentence to one of seven years' preventive detention.

Borstal training

In R. *v*. FALL, the court (Lord Goddard C.J., Gorman and Diplock JJ.: November 4, 1957) altered a sentence of Borstal training to one of three years' imprisonment. F. had pleaded guilty at quarter sessions to shopbreaking and two other offences were taken into consideration. F., who was twenty years of age, had five previous convictions for offences of breaking and entering and larceny. The total number of previous breakings, including those taken into consideration, was in the region of thirty. His previous sentences included probation, approved school and Borstal training. The prison commissioners reported that F. was unsuitable for further Borstal training. The court stated that, as the prison commissioners had reported that F. was not suitable for Borstal training and in view of his previous history, Borstal training was not suitable. The appropriate sentence was three years' imprisonment.

In R. *v*. BOATH, the court (Lord Goddard C.J., Gorman and Diplock JJ.) approved a sentence of Borstal training but stated that a sentence of twelve months' imprisonment would have been more suitable. B. had pleaded guilty at a magistrates' court to stealing lead fixed to a dwelling-house and was committed under section 28 of the Magistrates' Courts Act, 1952, to quarter sessions for sentence with a view to Borstal training. At quarter sessions he was sentenced to Borstal training. B., who was twenty years of age at the time of his conviction, had only one previous conviction for receiving. For that offence he had been put on probation and the present offence was committed whilst he was still on probation. The court stated that the offence of stealing lead fixed to a dwelling-house was one of which the court always took a grave view because of the damage which might result. The appellant had been committed under section 28 of the Act of 1952 with a view to a sentence of Borstal training and the court could, therefore, only pass a sentence of six months' imprisonment, being the maximum sentence the magistrates could have given, or impose Borstal training. The court would probably have given twelve months' imprisonment had that course been open, but as it was not, the court would, with some reluctance, confirm the sentence of Borstal training.

In R. *v*. POOL, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 2, 1957) upheld a sentence of two and a half years' imprisonment. P. had pleaded guilty at quarter sessions to storebreaking and larceny, nine other offences being taken into consideration. P., who was a man of eighteen years of age, had six previous convictions, including probation for larceny, approved school for housebreaking and Borstal for officebreaking and possessing an offensive weapon. The present offences, committed whilst "on the run" from Borstal, were breaking into houses and stores and stealing small sums of money and articles of food and clothing. The court stated that, as P. had apparently run away from Borstal on three occasions, it was clear that Borstal training was a failure. Whilst a sentence of two and a half years' imprisonment seemed a severe sentence on a boy of eighteen, a boy who ran away from Borstal was not to be encouraged to hope that he would get a short sentence. The only way to make it clear to Borstal boys that it did not pay to run away was to pass a fairly longish sentence, and that is what had been done in this case.

In R. *v.* ROWLAND, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 9, 1957) varied a sentence of Borstal training to one of nine months' imprisonment. R., with two others, was convicted at quarter sessions of maliciously inflicting grievous bodily harm. R., who was a man of twenty years of age, had three previous convictions. In 1951 he had been put on probation for larceny, in 1956 he had been fined for being drunk and disorderly and, later the same year, he had been sent to a detention centre for three months for using threatening behaviour. The present offence arose out of a disturbance in a coffee bar when R. with two others struck another man with their fists and kicked him. The court stated that this was a serious case and a serious assault and that, as this was a young man of almost twenty-one who had already been to a detention centre, it was quite inappropriate to send a young man of this sort to Borstal; the appropriate sentence was nine months' imprisonment.

In R. *v.* HARRIS, the court (Cassels, Streatfeild and Slade JJ.: February 10, 1958) varied a sentence of Borstal training to one of nine months' imprisonment. H., who was a man of twenty years and ten months of age at the date when sentence was passed, had pleaded guilty before a magistrates' court to carrying an offensive weapon (a "flick" knife), stealing a Post Office Savings Bank book (from a fellow worker with whom he shared a room in a hostel) and obtaining money by a forged document (namely, drawing £5 from the bank book by means of a forged withdrawal form). The magistrates had committed H. for sentence to quarter sessions under section 28 of the Magistrates' Courts Act, 1952. H. had four previous convictions for serious crime, including larceny, forgery of a pay ticket and indecent exposure for which he had been given probation or fined. The court stated that the quarter sessions in this case were quite unable to pass an appropriate sentence because H. had been committed for sentence under section 28 [committal with a view to Borstal training] rather than under section 29 [committal for sentence generally]. This sentence was being reconsidered with a view to a prison sentence being passed instead of Borstal training. The court was of the opinion that H. should have some real discipline and, in those circumstances, the sentence would be varied to one of six months' imprisonment concurrent for each of the bank book offences and three months' imprisonment consecutive for the offence of carrying an offensive weapon ; nine months' in all.

[NOTE: This case follows R. *v.* PEGG (1952) 36 Cr.App.R. 113.]

Probation

In R. *v.* O'SULLIVAN, the court (Lord Goddard C.J., Donovan and Havers JJ.: October 28, 1957) varied a sentence of Borstal training to one of probation for three years. O. had pleaded guilty at quarter sessions to receiving, being accessory after the fact to shopbreaking and to aiding and abetting the offence of larceny. O., who was a man of eighteen years of age, had no previous convictions. He was a plasterer by trade and a good workman but he had apparently got into bad company by frequenting a café in company with the other young men concerned in the offences. The probation officer reported that probation might be successful. The court stated that, in view of O.'s age and of his previous good character and of the reports received, the appropriate sentence was one of three years' probation.

In R. *v.* EVERSON, the court (Lord Goddard C.J., Cassels and Slade JJ.: February 17, 1958) varied a sentence of Borstal training to one which would permit immediate discharge. E., who was a young man of eighteen years of age, had been sentenced by quarter sessions for breach of probation in failing to report to the probation officer. In the course of eleven months he had failed to report as directed on six occasions in spite of warnings. E. had said that after a hard day's work he did not feel like taking a shilling bus ride, but could only think of having his dinner and going to bed. He had promised to comply with these directions in the future. The court stated that E. was at work at the time and working well. He was earning a great deal of money—perhaps too much—and very likely he did not go to see the probation officer because he was very tired after a hard day's work. That was not to be encouraged but taking into consideration that E. had been in custody since sentence was passed on November 13, he had been in custody long enough and would be discharged.

Binding over

In R. *v.* MACKIE, the court (Hilbery, Jones and Salmon JJ.: January 27, 1958) varied a sentence of nine months' imprisonment for warehousebreaking to a bind over for two years. M., who was a man of twenty-seven years of age, had no previous convictions. He had been discharged from the army after three years' service with the rank of corporal and with an exemplary character. M. had pleaded guilty at quarter sessions to breaking into a paper warehouse and stealing 17s. 6d.: two other offences, factory-breaking and school-breaking, were taken into consideration. The court stated that M. had shown that he was capable of being an honest man and it was in the hope that he would take advantage of the opportunity that they would bind him over in his own recognisance of £5 to be of good behaviour for two years.

Disqualification from holding driving licence

In R. *v.* WISEMAN, the court (Lord Goddard C.J., Devlin and Pearson JJ.: November 18, 1957) reduced a period of disqualification from ten years to twelve months. W. had been convicted at quarter sessions of driving a motor-car whilst under the influence of drink to such an extent as not to have proper control over it. W., who was a man of sixty-one years of age, was a doctor in general practice and had one previous conviction for careless driving in 1955. In the present case quarter sessions had imposed a fine of £200 in addition to the period of suspension. The court stated that they were satisfied that this was a bad case and that the fine ought to stand. As regards the disqualification Lord Goddard C.J. said: " We think, considering that this man is a doctor, we ought to interfere with the disqualification, and in one way it may be said we are balancing the protection of the public and the convenience of the public. For the protection of the public it may be that it would be a right thing to disqualify this man for a long time but, on the other hand, one has to remember that he is a doctor with a panel practice." The court decided, in these circumstances, that a disqualification of twelve months was appropriate.

In R. *v.* HILL, the court (Lord Goddard C.J., Devlin and Pearson JJ.: December 18, 1957) increased a period of disqualification from two years to five years. H. had been convicted at a Crown court of driving a motor-car whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. H., who was a man of forty-six years of age, had a number of motoring convictions dating from 1934 and he also had two convictions, in 1938 and 1941, for being drunk and disorderly. In 1955 he had been convicted of exceeding the speed limit and in 1956 he had been fined forty shillings for careless driving. There was no previous conviction of driving whilst under the influence of drink. The present offence was committed when, at 3.30 p.m. on a Sunday, H. drove the wrong way down a one-way street, turned left round three corners and finished up on the off-side pavement. After a struggle with a police officer, H. was taken to a police station where a police doctor decided he was unfit to drive. In the present case the Crown court had imposed a sentence of six months' imprisonment in addition to the period of disqualification. The court stated that, having regard to the appellant's record, the period of disqualification was not long enough. The sentence of six months' imprisonment was to stand but the appropriate period of disqualification was five years.

Practice and Procedure

Magistrates' Courts

Companies and the new procedure

When those who drafted the Magistrates' Courts Act, 1957, framed the provisions relating to pleas of guilty by and proof of previous convictions against absent defendants in summary cases, they did not deal specifically with the position of an accused corporation. The result is that the extent to which these provisions are applicable to limited companies is far from clear.

Section 1 of the Act, by its own terms, applies the procedure it authorises with regard to pleas of guilty to cases where certain prescribed documents have been served on the accused with the summons to appear. On this wording there is nothing to prevent the prosecutor of a limited company from having the necessary forms served with the summons at the company's registered office, or at a place in England and Wales where it trades or carries on business if its registered office is in another country (see Rule 76 (3) of the Magistrates' Courts Rules, 1952). The new procedure cannot, however, become effective, so far as the hearing is concerned, unless the clerk of the court receives "a notification in writing purporting to be given by the accused or by a solicitor acting on his behalf that the accused desires to plead guilty without appearing before the court."

No difficulty arises on this if a written plea of guilty is sent to the court by the solicitors to a limited company. But, in the majority of cases to which the new procedure is applied, the company does not go to the expense and trouble of instructing a solicitor. Experience shows that what is far more likely to be received by the magistrates' clerk is a written plea of guilty signed (often illegibly) by some individual whose connection with the company may or may not be made explicit. The questions that have to be answered then are: can the court, in any circumstances, act on such a document; and, if so, what are the circumstances which would make it acceptable?

If the terms of the statute were that a written notification of a plea of guilty must be given by the accused, one would have to ask a preliminary question: how, if at all, can a limited company plead guilty to a summary offence in writing? Specific provision is made in the Second Schedule of the Magistrates' Courts Act, 1952, and in section 33 of the Criminal Justice Act, 1925, for a specially authorised representative to take a limited part in proceedings against a corporation, but his power to enter a written plea of guilty is confined to a trial at assizes or quarter sessions. The fact that it was deemed necessary to legislate specially for this case seems to indicate that there is no general provision of the law which enables a court to accept a written plea of guilty from a corporation's representative. This, however, is not precisely the document which is specified in the Magistrates' Courts Act, 1957; the terms of section 1 are satisfied by a notification in writing " purporting " to be given by the accused. The point which has to be decided is, therefore, how does a written plea of guilty purport to be given by a limited company?

If such a document is on what appears to be the company's headed notepaper and proclaims itself to be signed by the secretary or a director of the company, it would be reasonable to say that it purports to be given by the company—though a purist might still object that it should bear the company's seal. In actual practice, the written plea of guilty is, more often than not, on a form supplied by the court, and, at the most, the only official indication of the company's responsibility for the document is a rubber stamp. In actual practice, too, persons other than the company's secretary or a director sign such forms. Even where their signatures are backed by a rubber stamp (and this is not always the case) should the court accept them as purporting to express the company's decision with regard to its plea to what is, after all, a criminal offence? The answer would surely be " no " if the extreme—and improbable—example is considered of a notification signed by the office boy and frankly giving his status. Does this mean that the court must examine carefully the official position of the signatory to every communication purporting to plead guilty on behalf of a company, and decide, by reference to that factor and to other indications supplied by the form of the communication, whether or not it is acceptable as a plea of guilty on behalf of the company? If so, the court will have to perform this duty without any guidance from the law on the criteria to be applied.

It is always wise for magistrates' courts to decline to exercise powers about which there is a doubt, and it would therefore, seem a good rule of practice not to accept any written plea of guilty from a company unless it purports to be given by a solicitor. This is a pity, because the purpose of the new procedure will often be frustrated in consequence. The most frequent occasion for wishing to use section 1 of the 1957 Act in relation to a company is when it is the owner of a motor vehicle, the driver of which has also been summoned because of the vehicle's use in a defective condition. The driver may send a written plea of guilty about which there can be no doubt but the witnesses in the case will still have to attend if there is no communication from the company which can be taken as satisfying the terms of section 1 of the new Act. It may be that this difficulty could be met by Rules; legislation of some kind seems necessary to clarify the position and make the new procedure fully effective in the case of corporations.

Another provision of the Magistrates' Courts Act, 1957, which, at least on the face of it, is not easy to apply to corporations is section 3. This permits a court to " take account " of a previous conviction " as if the accused had appeared and admitted it," provided that a notice specifying it has been served on the accused " in the prescribed form and manner." The prescribed manner is to be found in Rule 2 (2) of the Magistrates' Courts Rules, 1957, which reads " service of the said form may be effected by delivering it to the person to whom it is directed or sending it by post in a registered letter addressed to him at his last known or usual place of abode." This wording clearly refers only to a corporeal defendant; if a notice of previous conviction is to be validly served on a company, authority for an acceptable method of service must be found elsewhere.

Section 437 (1) of the Companies Act, 1948, enacts that " a document may be served on a company by leaving it or sending it by post to the registered office of the company " ; and " document " by section 455, includes any " notice." Section 437 does not, however, contain any such words as " notwithstanding the provisions of any other act " ; it is doubtful, therefore, whether it can be relied on to override the specific requirement of section

3 of the 1957 Act that the notice in question must be served "in the prescribed form and manner."

If it is legally permissible to serve a notice of previous conviction on a corporation it seems that it can be so only by the operation of Rule 76 of the Magistrates' Courts Rules, 1952. Paragraph 4 of this Rule reads "Any summons or other document served in manner authorised by the preceding provisions of this rule shall, for the purposes of any enactment other than the Act or these rules requiring a summons or other document to be served in any particular manner, be deemed to have been as effectively served as if it had been served in that manner"; and paragraph 3 authorises as a manner of service of a summons or other document on a corporation "delivering it at, or sending it by post to, the registered office of the corporation, if that office is in England and Wales or, if there is no registered office in England and Wales, any place in England and Wales where the corporation trades or conducts its business."

It can be argued that the wording of this Rule is wide enough and definite enough to justify serving a notice of previous conviction on a corporation in the same way as a summons is served. The objection to the argument is that the 1957 Act is to be construed as one with the Magistrates' Courts Act, 1952, and is therefore not "an enactment other than the Act" within the meaning of Paragraph 4 above. If this objection is a valid one the position must be that limited companies will often avoid the consequences of multiple convictions, because those courts which take the view that past offences should not, in the ordinary way, be mentioned in the absence of a defendant, will be unable to take them into account except where the company appears by solicitor or the prosecution takes the trouble to be prepared with strict proof of them. Previous convictions have a particularly important bearing on penalties in connection with the use of defective motor vehicles on roads. It would be an unfortunate anomaly if liability to punishment for a bad record of vehicle maintenance depended on whether the owner was a limited company or a person in the ordinary meaning of that word. [A. E. JONES.]

General

Sikhs and the oath

In December last at Leeds Assizes three Sikhs were on trial in two separate cases. The first was charged with perjury arising out of evidence he had given in a magistrates' court in which other Sikhs were also involved.

The Sikhs' Holy Book upon which they should be sworn if they have a religious belief, is called a *Granth*: this was not available in the magistrates' court, and although the Sikhs in question professed to have a religious belief they were affirmed. The point was taken at the trial that where a witness has a religious belief he must be sworn according to his faith, and after argument Mr. Commissioner Wrangham stopped the case and directed the jury to acquit.

In the second case—the facts are immaterial—counsel moved to quash the indictment on similar grounds. The Commissioner upheld this submission and the indictment was accordingly quashed. The prosecution agreed they were in a difficulty in attempting to support the committal proceedings. The case was sent back to the magistrates to be heard *de novo* under proper oath.

During the evidence in the first case it was necessary to swear a Sikh and it was done in the following manner:

Q. Mr. Interpreter, will you ask the witness whether he speaks and understands English.

A. No.

Q. Will you tell him that I am going to administer the oath to him. Does he first wish to wash his hands?

A. No. I washed them immediately before I came into court.

Q. Will you ask him to remove his shoes and cover his head. (*After this is done continue*): Will you now ask him to take the *Granth* out of the box on the ledge of the witness-box, look down upon it and repeat after me:

> I SWEAR BY OUR GURU NANAK THE FOUNDER OF THE SIKH RELIGION THAT THE EVIDENCE I SHALL GIVE SHALL BE THE TRUTH THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

Q. Is the oath you have taken binding on your conscience?

A. Yes.

A bowl of water and a clean towel must be available in court in case the witness wishes to wash his hands. The head is covered with a large handkerchief.

The *Granth* must be placed in a box for the witness to remove himself. It is important that it must not be touched by anyone who is not of the Sikh faith otherwise it becomes " unclean " and they may refuse to take the oath. Some may wish to hold the *Granth* on their head. The *Granth* is about 12 in. by 8 in. by 5 in. and is bound in leather.

The only *Granth* that is available other than those in their Temples in London and Glasgow is at Leicester University and application for its use should be made through the police of that city. [EDWARD G. LOVE.]

Summary Justice

Disturbances

Throwing bags of flour after the installation of the Home Secretary, Mr. R. A. Butler, as Rector of Glasgow University; fined £5 each; Glasgow Stipendiary Magistrates' Court (*Manchester Guardian*, March 12).

Food and drugs

Selling sausages not of the substance and quality demanded, *i.e.*, having a meat content of only 40·7 per cent.; fined £5 including costs; Elliott: Doncaster Magistrates' Court (*Daily Telegraph*, March 19).

Licences

Allowing a Boys' Brigade pantomime to be staged in a church hall without having a licence, contrary to the provisions of the Theatre Act, 1843; fined £2 2s.; Powell: Grimsby Magistrates' Court (*Manchester Guardian*, March 18).

Road traffic

Driving a car while being a provisional licence holder and not being accompanied by a qualified driver, contrary to the provisions of the Motor Vehicles (Driving Licences) Regulations, 1950; fined £5; Orbell: Wakefield City Magistrates' Court (*Wakefield Express*, March 15).

Riding a pedal cycle without lights, contrary to the provisions of the Road Vehicles Lighting Regulations, 1954; fined £5; Harrison: Bridlington Magistrates' Court (*Yorkshire Evening Post*, March 19).

Case and Comment *

Appeal—*Fresh evidence—material discrepancies*

BAKSH *v.* R.[1] (Judicial Committee of the Privy Council: Lords Reid, Tucker, Somervell of Harrow and Denning and the Rt. Hon. L. M. D. de Silva: February 13, March 11, 1958) ([1958] 2 W.L.R. 536).

B. was charged with murder by shooting. At his trial he alleged that the evidence of certain witnesses for the prosecution was false. He was, however, convicted. On appeal, the Court of Criminal Appeal of British Guiana admitted fresh evidence, which consisted of certain written statements made by three of the witnesses whose evidence B. had alleged to be false. There were material discrepancies between the oral evidence which the witnesses had given and the written statements which they had made. The Court of Criminal Appeal, in dismissing B.'s appeal, said that since the statements contained nothing favourable to B., the verdict could not be disturbed on their account.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the appellant: *Bernard Gillis Q.C.* and *J. Lloyd-Eley* (instructed by Hy. S. L. Polak & Co.). For the Crown: *J. G. Le Quesne* (instructed by Charles Russell & Co.).

Held, allowing the appeal, that if the statements provided material with which the credibility or reliability of the witnesses could have been challenged, it followed that the defence might have been able to destroy the case against B. [D. C.]

COMMENTARY. By English law, a witness may be cross-examined as to a former statement made by him relative to the subject-matter of the indictment and inconsistent with his present testimony. If the witness does not then admit that he made the earlier statement, proof may be given that he did in fact make it: Criminal Procedure Act, 1865, s. 4. The proof of the earlier statement is evidence only to discredit the story which the witness tells in the witness-box and is not evidence of the facts stated therein: *R.* v. *Dibble* (1908) 1 Cr.App.R. 155; *R.* v. *White* (1922) 17 Cr.App.R. 60.

Great importance is attached by English law to cross-examination; "it is beyond doubt the greatest legal engine ever invented for the discovery of truth" (Wigmore, *Evidence*, 3rd ed., v., § 1367). It is therefore a serious flaw in the proceedings if it appears that a proper cross-examination of important witnesses was not possible at the trial.

Evidence—*Bills of lading inadmissible*

R. *v.* GORDON and SPENCER[2] (Court of Criminal Appeal: Streatfeild, Slade and Havers JJ.: March 18, 1958) (*The Times*, March 19, 1958).

G. and S. were convicted at a Crown Court of, *inter alia*, conspiracy to steal cotton from the Liverpool Docks. The case for the prosecution was that G. and S. had organised or taken part in a scheme whereby cotton was stolen from the docks in the off-loading of twelve different ships and was subsequently sold through a cotton merchant. The prosecution sought to prove the arrival of the cotton at the docks by means of bills of lading (produced by employees in the offices of the shipping lines concerned) which showed the number of bales of cotton alleged to have been shipped and also the geographical origin of the bales. The prosecution also sought to prove the departure of the cotton from the docks by evidence from "counters-off" (*i.e.*, employees who received information as to the cotton loaded onto the consignees' lorries). At the trial counsel for the defence objected to the admissibility of both classes of evidence, but the trial judge ruled that the evidence was admissible. On appeal to the Court of Criminal Appeal:

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[2] For the appellant Gordon: *R. H. Montgomery* (instructed by the Registrar, Court of Criminal Appeal). For the appellant Spencer: *Gerald Wright* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. W. Guthrie Jones* (instructed by the Prosecuting Solicitor, Liverpool).

Held, allowing the appeals, that the bills of lading were clearly inadmissible evidence for the purpose of proving the number and type of bales on a ship; that could only be proved by evidence as to the bales on the ship or as to the bales which were off-loaded. Equally valueless was the evidence as to the bales which left the quay. Whereas that could have been proved by admissible evidence from the "checkers" (*i.e.,* employees who themselves supervised the loading of the bales onto the consignees' lorries), the prosecution chose to call the "counters-off" to give evidence of what they had been told by the "checkers." It followed that the prosecution had never proved by any admissible evidence what was off-loaded from the ships and what was loaded by the consignees, so that there was no evidence of any deficiency. Accordingly all the convictions which rested upon that evidence would be quashed. [H. P.]

COMMENTARY. Both classes of evidence were presumably excluded on the ground that they were hearsay. A document which recites a fact is not evidence of that fact, unless it comes within some exception to the hearsay rule. For the purposes of the civil law, the Evidence Act, 1938, creates wide exceptions to this rule, but the main provisions of that Act have no application in criminal cases. For a criticism of the exclusion of criminal cases from the 1938 Act, see Cowen and Carter, *Essays on the Law of Evidence*, 10–12. For criticisms of the application of the hearsay rule to documentary evidence, see Glanville Williams, *The Proof of Guilt* (2nd ed.), 165 *et seq*. However, the attention of the court was not drawn to the Carriage of Goods by Sea Act, 1924, Sched. I, Art. III (4) which provides that a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods. We respectfully submit that there is no reason why this rule should not apply in criminal cases. [*Editors.*]

Evidence—*Burden of proof—evidence ordinances of Singapore*

NG *v*. R.[3] (Judicial Committee of the Privy Council: Lords Reid and Tucker and the Rt. Hon. L. M. D. de Silva: March 19, 1958).

Ng was charged with having attempted to cheat and to obtain moneys from H. by representing to H. that she, Ng, was able to induce a magistrate to show him favour in a case in which he had been charged with being in possession of prepared opium and smoking utensils. At Ng's trial the magistrate was not called as a witness. By section 107 of the Evidence Ordinance of the Colony of Singapore it is provided that " when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The trial judge held that the burden of proof with regard to the essential element of deception—*i.e*., that Ng had not, at the time of making the representation, believed it to be true—lay upon Ng, since it was said to be a fact especially within her knowledge. Ng was convicted and her conviction upheld on appeal to the High Court of the Colony. On appeal to the Privy Council:

Held, following *Attygalle* v. *R.* [1936] A.C. 338, that section 107 of the Evidence Ordinance placed no burden on Ng to prove that there had been no deceit: the burden was upon the prosecution to prove affirmatively that there had been. [D. C.]

COMMENTARY. Section 107 codifies a common law rule of evidence: *R.* v. *Turner* (1816) 5 M. & S. 206; *John* v. *Humphreys* [1955] 1 W.L.R. 325. It is clear, however, that this rule is not of universal application: *cf. Hill* v. *Baxter* [1958] Crim.L.R. 192, and commentary thereon. It is clear that the common law rule does not extend so far as to dispense the prosecution from proving *mens rea* on a charge of obtaining by false pretences: *R.* v. *Dunleavey* (1908) 1 Cr.App.R. 240; *R.* v. *Dutt* (1912) 8 Cr.App.R. 51.

In *R.* v. *Attygalle* the Privy Council held that the Ceylon Evidence Ordinance, No. 14 of 1895, s. 106 (which is in precisely the same terms as the section under consideration), did not throw upon the accused the burden of proving that an operation performed by him upon an unconscious person was not of a criminal nature. The Board did not give any indication of the scope of the section. It is submitted, however, that it is probably subject to the same limitation as the common law rule.

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[3] For the appellant: *Bernard Gillis Q.C.* and *J. Lloyd-Eley* (instructed by Kingsley Wood & Co.). For the Crown: *J. G. Le Quesne* (instructed by Charles Russell & Co.).

Mental defective—*Carnal knowledge of—woman not legally certified*

D. P. P. *v.* HEAD[4] (House of Lords: Viscount Simonds, Lords Reid, Tucker, Somervell of Harrow and Denning: March 6, 1958).

H. was charged with having had carnal knowledge with a mental defective, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913.

By a Home Office order, made in 1947, the woman victim had been transferred from an approved school to a certified institution as having been " duly certified to be mentally defective " in purported pursuance of section 9 of the Act. At H.'s trial it was not disputed either that sexual intercourse had taken place or that H. had known that the victim was on licence from an institution. The prosecution produced two medical certificates which had been before the Secretary of State at the time when he had made the order and on which he had to be satisfied that the girl was a defective. Neither certificate contained any evidence on which it could be said that the victim was a moral defective within the meaning of section 1 (1) (*d*) of the Act. H. was convicted. On appeal, it was contended that since the certificates were defective on their face, and could have been successfully challenged on an application for habeas corpus, the victim was not a lawfully detained person " under care or treatment in an institution . . . or placed out on licence therefrom . . . " and that therefore H. was not liable to be convicted under section 56 (1) of the Act. The appeal was allowed ([1958] Crim.L.R. 52). On appeal by the Crown to the House of Lords:

Held (Viscount Simonds dissenting), that proof that a person was under care or treatment in an institution or on licence was prima facie proof that the person was lawfully under such care or treatment; and the Crown was entitled to presume such lawfulness. But legality was the foundation of the presumption; and if it were shown (as in the present case) that, on the face of the documents under which the order had been made, the detention was illegal, the presumption and the prosecution must fail.

Per curiam: The prosecution should have the documents on which the detention is based available for inspection by the defence at the trial, so that in a proper case and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

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[4] For the Crown: *Sir Reginald Manningham-Buller*, *Att.-Gen.*, *Q.C.*, *Rodger Winn* and *A. Booth* (instructed by the Director of Public Prosecutions). For the accused: *G. W. Guthrie Jones* (instructed by Ludlow, Head & Walter).

Per Viscount Simonds (dissenting): Once it is proved that a person is under the care or treatment in an institution or on licence, it is irrelevant whether or not the detention is lawful.

Per Lord Somervell: Whether or not a man should go to prison should not depend upon the distinction between a void and a voidable order. [D. C.]

COMMENTARY. The Crown's contention appears to have been that the woman was still "on licence" from an institution under the Act notwithstanding that the order for her detention would have been quashed on the making of an appropriate application; in effect that the order was voidable but not void. Lord Somervell was not satisfied that the order was not void: but the *ratio decidendi* of the case (as expressed in the judgments of Lord Tucker and Lord Somervell who concurred with each other and with whom Lord Reid agreed) is that there can be no conviction under section 13 where the detention order is either void or voidable. Viscount Simonds thought that the prosecution should succeed if the woman was in fact detained in, or on licence from, an institution, whatever defect there might be in the detention order.

Lord Denning, however, thought that the vital question was whether the original order was absolutely void or only voidable; and, holding it to be voidable merely, he found that the continuation orders were valid and so was the licence. He thus held that, in law, the accused was guilty. In substance, therefore, Lord Denning dissented. But he was unwilling to restore the conviction since the distinction between void and voidable was not made clear to the Court of Criminal Appeal whose decision was based on the admission made by the Crown that the order was "invalid." Lord Denning would give the Attorney-General the ruling he seeks when he grants his fiat for an appeal from an acquittal by the Court of Criminal Appeal; but he "would not, on this account, restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below." This seems to be a new attitude towards appeals by the Crown and is based on the exceptional nature of appeals from acquittals.

All of their Lordships appear to have held that it is unnecessary to prove that the woman is in fact a defective; but Lord Denning again differed on what must be proved. Lord Tucker (with whom Lords Reid, Somervell and—on this point—Viscount Simonds agreed) held that it is necessary only to prove that the woman is detained as an inmate in one of the specified institutions and is under care and treatment therein or is out on licence therefrom; and then to rely on the presumption of legality. Lord Denning thought it necessary to produce the relevant documents, emphasising that no person can be detained except under warrant of lawful authority, which, if in writing, must be produced. The majority, however, pointed out that the woman's liberty was not at issue in this case.

The accused had *mens rea* in the fullest sense for he had been warned by the superintendent, on a previous occasion, that the girl was a patient on licence from the institution. He had no reason to suppose that she was illegally detained. If the facts had been as he supposed them to be he would have committed the crime. Some writers suggest that in such circumstances the accused may properly be convicted of an attempt: Glanville Williams, *The Criminal Law,* section 148; Jerome Hall, *General Principles of Criminal Law,* 117 *et seq*. It is submitted, however, that the balance of authority is against such a view. *Cf.* J. C. Smith, "Two Problems in Criminal Attempts," 70 *Harvard Law Review* 422. For a detailed examination of this case, see p. 279, *ante.*

Sentence—*Concurrent sentences—form of words used*

Re HASTINGS [5] (Q.B.: Divisional Court: Lord Goddard C.J. Streatfeild and Slade JJ.: March 7, 1958 [1958] 1 W.L.R. 372).

H. had been found guilty on each of five counts contained in an indictment. The recorder said to H., in passing sentence, "You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. . . . You will go to prison for four years' corrective training." On appeal against conviction on the first three counts, the Court of Criminal Appeal, whilst dismissing the appeal on the second and third counts, nevertheless allowed the appeal and quashed the conviction on the first count. The Court said, however, that "the actual sentence given was in our view a reasonable sentence and there is no reason for interfering with it."

On an application for a writ of habeas corpus it was submitted that the sentence passed by the recorder had either been on the first count, the conviction in respect of which had now been quashed, or, generally, in respect of all the counts, which, since the decision in *O'Connell* v. *R.* ((1844) 5 St.Tr.(N.S.) 1) was a sentence which was invalid *ab initio,*

Held, that it was clear from the language which the recorder had used that he had intended to pass a sentence of four years' corrective training on each count, the sentences to run concurrently: provided the judge's intention was clear, the precise form of words which he had used was immaterial.

Per curiam: It is desirable for a court to use such words as "on each count" or "concurrent" when passing sentence in such a case. [D. C.]

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[5] For the applicant: *A. P. Marshall Q.C.* and *Neil Butter* (instructed by Field Roscoe and Co. for Keith Moore, Birkenhead). For the Governor of Liverpool Prison: *Rodger Winn* and *G. J. Bean* (instructed by the Treasury Solicitor).

COMMENTARY. If a prisoner is sentenced, *e.g.*, to one year's imprisonment on each of two counts, the sentences to run *consecutively*, and his conviction on one count is quashed, the sentence is reduced from two years to one year, *R.* v. *Lurie* (1951) 35 Cr.App.R. 113, 119; whereas if the two sentences are to run concurrently and a conviction on one count is quashed, the sentence remains unaltered at one year: *R.* v. *Davenport* [1954] 1 W.L.R. 569, 572. But, as Lord Goddard emphasised in the present case, the Court of Criminal Appeal has a discretion in such circumstances to reduce the sentence.

The difficulty in the present case arose from the fact that the recorder did not say expressly to which count or counts the sentence was applicable and it was therefore arguable that it might have been on the first count only, which was quashed. The holding that the proper interpretation of the recorder's language was that he was imposing sentences on each count, to run concurrently, resolved this difficulty.

Sentence — *Taking other offences into consideration — military offences*

R. *v.* ANDERSON [6] (Court of Criminal Appeal: Cassels, Slade and Havers JJ.: March 3, 1958) (*The Times*, March 4, 1958).

A. was sentenced to eighteen months' imprisonment by quarter sessions for larceny. On appeal to the Court of Criminal Appeal against this sentence:

Held, dismissing the appeal, that leave to appeal had been granted in this case in order that the court might consider whether other offences committed by the appellant as a soldier could properly be taken into consideration by quarter sessions in sentencing him for a civil offence. A. was, at the time of his conviction, awaiting trial by court-martial for a series of offences including larceny from other soldiers. Those offences were military offences, but they were also offences against the civil law. Where a civil court had jurisdiction to deal with such offences a court of quarter sessions was entitled to take them into consideration; but there was no such power where the offences were solely military offences. [H. P.]

COMMENTARY. The fact that the other offences have been taken into consideration would not afford a defence to the accused if the charges should be proceeded with; but, no doubt, those charges will now have been dropped. The appellant's commanding officer had asked particularly that those offences should be taken into consideration.

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[6] The appellant did not appear and was not represented. The Crown was not represented.

Sentence—*Transposition of sentences—correction in prisoner's absence*

R. *v.* LLOYD[7] (Court of Criminal Appeal: Lord Goddard C.J., Streatfeild and Paull JJ.: March 19, 1958) (*The Times*, March 20, 1958).

L. was convicted at quarter sessions of (i) garage-breaking and stealing petrol; (ii) taking and driving away a motor-car without the consent of the owner; and (iii) driving whilst disqualified. He was sentenced to three months' imprisonment on the first count, twelve months' on the second count and three years' on the third count, the sentences to run concurrently. After the prisoner had left the dock and while the court was still in session the chairman said that he had intended to pass sentence of three years' on the first count, twelve months' on the second count and three months' on the third count. On appeal to the Court of Criminal Appeal:

Held, allowing the appellant to be discharged, that by an unfortunate slip of the tongue the chairman transposed the three years' sentence and the three months' sentence. If the chairman had made the correction in the presence of the prisoner, that would have been perfectly all right, but, as this was a felony, the sentences could not be altered in the absence of the prisoner. The matter could be put right by passing the maximum sentence of six months' imprisonment for the third count and, as all the sentences had been served, the appellant would be discharged. [H. P.]

COMMENTARY. A court has power to alter a sentence so long as it is in session and until the document which is delivered to the gaoler as recording the sentences of the court is finally signed: *R.* v. *Batchelor* (1952) 36 Cr.App.R. 64. In a case of treason or felony the prisoner must be present when sentence is passed: *R.* v. *Hales* [1924] 1 K.B. 602.

Verdict—*Inconsistent verdicts—reconsideration by jury*

R. *v.* MULVEY[8] (Court of Criminal Appeal: Cassels, Slade and Havers JJ.: March 5, 1958) (*The Times*, March 6, 1958).

M. was tried at assizes upon an indictment containing three counts alleging (i) rape, (ii) assault with intent to ravish, and (iii) assault occasioning actual bodily harm, all arising out of the same incident. The jury returned verdicts of guilty of attempted rape (on the first count) and of not guilty on the other two counts. After submissions by counsel as to the inconsistencies disclosed by these verdicts, the jury were invited to retire again to reconsider the second and third counts. The jury then returned verdicts of guilty on counts two and three. On appeal to the Court of Criminal Appeal by the certificate of the trial judge (limited to the question of the inconsistency of the verdicts): —

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[7] For the appellant: *Watkin Powell* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. C. Phipps* (instructed by the Director of Public Prosecutions).

[8] For the appellant: *E. J. Parris* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. Baker* (instructed by R. C. Linney, Esq., Wakefield).

Held, allowing the appeal, that in the circumstances of this case an attempted rape involved an indecent assault and also a common assault, and yet the jury had at first returned verdicts of not guilty on counts two and three. It was unfortunate that the jury had been asked to reconsider, not the whole of their verdict but their verdict on the last two counts only. In fact a verdict on the first count made verdicts on the other two counts unnecessary but, those verdicts having been taken, the jury could properly be asked to reconsider the whole of their verdict. On the indictment as drawn in this case the jury had had to consider no fewer than seven different offences and it was not surprising that they were confused. The prevailing practice of making long indictments and putting in many counts ought to be reconsidered by those who have the duty of drawing indictments in a simple case like the present one. The conviction would, therefore, have to be quashed. [H. P.]

COMMENTARY. If the jury had been told that, if they found the prisoner guilty of attempted rape, they need not consider the other counts the difficulty may not have arisen. Is it not likely that the jury in fact decided that counts two and three did not matter when they had agreed to convict on count one?

Acts and Orders *

Food and Drugs

MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1958 (S.I. No. 485): operative April 14, 1958. Section 41 of the Food and Drugs Act, 1955 (4 & 5 Eliz. 2, c. 16), enables the Minister of Agriculture, Fisheries and Food and the Minister of Health, after consulting such representative organisations as appear to them substantially to represent the interests concerned, to bring into operation by order the provisions of section 37 (1) of that

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Act, relating to the compulsory use of special designations for retail sales of milk, in any area in England and Wales in which it is not then in operation. Representative organisations have been consulted and the provisions of section 37 (1) are now brought into operation in the areas specified in the Schedule.

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

Juvenile Courts

JUVENILE COURTS (LONDON) ORDER, 1958 (S.I. No. 417): operative April 1, 1958. The juvenile court which has hitherto sat at Stamford House, 206A, Goldhawk Road, Shepherd's Bush, W.12, is to sit instead at the Chelsea Juvenile Court, Walton Street, S.W.3, in every week on Thursday, at 10 a.m. The Juvenile Courts (London) Order, 1955 (S.I. 1955, No. 873), is amended accordingly.

London Traffic

LONDON TRAFFIC (40 M.P.H. SPEED LIMIT) (NO. 1) REGULATIONS, 1958 (S.I. No. 301): operative March 15, 1958. A speed limit of 40 m.p.h. is imposed on specified lengths of road in the London Traffic Area.

For penalties for contraventions, see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

TRAFFIC SIGNS (40 M.P.H. SPEED LIMIT) REGULATIONS, 1958 (S.I. No. 302): DIRECTIONS (S.I. No. 303): both operative March 15, 1958. The Regulations prescribe the size, colour and type of traffic signs which highway authorities in the London Traffic Area may use to indicate the 40 m.p.h. speed limit. The Directions are general directions given by the Secretary of State and the Minister of Transport and Civil Aviation relating to the manner and position in which these signs should be placed by the highway authorities concerned.

TRAFFIC SIGNS (30 M.P.H. SPEED LIMIT) (ENGLAND AND WALES) DIRECTIONS, 1958 (S.I. No. 304): operative March 15, 1958. The Directions of 1957 (S.I. 1957, No. 275; [1957] Crim.L.R. 337) are amended to provide that the requirements of showing signs to indicate whether roads are subject to a 30 m.p.h. speed limit are not to apply in cases where the 40 m.p.h. speed limit is in force in certain roads in the London Traffic Area (see S.I. No. 301, above).

The following Orders have been made detailing prescribed routes: S.I. Nos. 346 and 491 (Camberwell); 374 (Islington); 492 (Croydon).

The following Order has been made prohibiting cycling on footpaths: S.I. No. 329 (Hemel Hempstead).

Metropolitan Police Courts

METROPOLITAN POLICE COURTS (DOMESTIC PROCEEDINGS) ORDER, 1958 (S.I. No. 421): operative April 1, 1958. The Order of 1952 (S.I. 1952, No. 1860) is amended to provide that the magistrates' court which hears domestic proceedings for the City of London and the metropolitan police court area shall sit on Thursdays at Bow Street police court instead of, as hitherto, at the Chelsea juvenile court, Walton Street.

Pests

WART DISEASE OF POTATOES ORDER, 1958 (S.I. No. 308): operative March 5, 1958. The Wart Disease of Potatoes Order, 1941 (S.I. No. 1439), and the Wart Disease of Potatoes (General Licence) Order, 1953 (S.I. 1365), are revoked and re-enacted in consolidated form with amendments. The principal changes are that the Minister of Agriculture, Fisheries and Food may by notice declare and define land infected with wart disease; and the destruction of infected potatoes must be carried out in accordance with the terms of a notice served by an authorised officer. The provisions in the earlier Orders which prohibited the sale of infected potatoes, and the planting on infected land of susceptible varieties of potatoes, and which restricted the sale or planting of imported potatoes, are repeated in the new Order.

For penalties for contraventions, see Article 16 of the Order.

IMPORTATION OF NEW POTATOES AND RAW VEGETABLES ORDER, 1958 (S.I. No. 312): operative March 1, 1958. The restrictions imposed by the Importation of Plants Order, 1955 (S.I. No. 81; [1955] Crim.L.R. 196), on the importation into England or Wales of new potatoes from France, Portugal, Spain and the Latium region of Italy, and of certain raw vegetables from specified districts of Belgium, France, Italy and the Netherlands, are modified for specified periods of the year 1958.

Petroleum

CARBON DISULPHIDE (CONVEYANCE BY ROAD) REGULATIONS, 1958 (S.I. No. 313): operative April 1, 1958. The Bisulphide of

Carbon (Conveyance) Regulations, 1935 (S.R. & O. No. 583), and similar Regulations made in 1947 (S.R. & O. Nos. 1803 and 2109); 1948 (S.I. No. 2373) and 1949 (S.I. No. 271) are replaced with amendments. All those Regulations cease to have effect on the revocation by the Petroleum (Carbon Disulphide) Order, 1958 (S.I. No. 257), of an earlier Order (S.R. & O. 1926, No. 1422), upon which the continued operation of all the above-mentioned Regulations depend.

The principal changes are (1) the name "carbon disulphide" is used instead of "bisulphide of carbon"; (2) the maximum permissible total capacity of tank wagons is increased from 2,400 to 2,700 gallons and the maximum capacity of each compartment of a tank wagon is increased from 600 to 700 gallons (the capacity to be measured in the manner prescribed by Article 24 (2)); and (3) provision is made for the enforcement of the Regulations by local authorities.

For penalties for contraventions, see section 6 of the Petroleum (Consolidation) Act, 1928 (18 & 19 Geo. 5, c. 32).

Probation

PROBATION (SCOTLAND) AMENDMENT RULES, 1958 (S.I. No. 331): operative February, 1958, save as to rules 2 and 3 (which relate to the salaries of probation officers and senior probation officers) and which are operative from July 1, 1957, and March 1, 1957, respectively. The principal Rules (S.I. 1951, No. 1261), as subsequently amended are further amended so as to provide for increased salaries for all whole-time probation officers.

Public Health

ALKALI, ETC., WORKS ORDER, 1958 (S.I. No. 497): operative June 1, 1958. The discharge of certain noxious or offensive gases, smoke, grit and dust from certain types of works is subject to control under the Alkali, etc., Works Regulation Act, 1906 (6 Edw. 7, c. 14), as extended by virtue of section 17 of the Clean Air Act, 1956 (4 & 5 Eliz. 2, c. 52; [1956] Crim.L.R. 645). Both the types of works and the list of gases may be varied or added to from time to time by order of the Minister of Housing and Local Government. This Order makes the additions specified in the Schedules thereto.

For penalties for contraventions, see sections 1–8 inclusive of the Alkali, etc., Works Regulation Act, 1906, and section 17 of the Clean Air Act, 1956.

DARK SMOKE (PERMITTED PERIODS) REGULATIONS, 1958 (S.I. No. 498): operative June 1, 1958. Section 1 of the Clean Air Act, 1956 (4 & 5 Eliz. 2, c. 52; [1956] Crim.L.R. 645), makes it an offence to emit dark smoke (as defined in the Act) from the chimney of a building or of certain boilers or industrial plant, but makes exceptions in the case of emission of such smoke for such periods and subject to such limitations as may be specified by the Minister of Housing and Local Government. These exceptions from the general provisions of the Act are now specified, but they do not apply to emissions of smoke from vessels.

Public Service Vehicles

PUBLIC SERVICE VEHICLES AND TROLLEY VEHICLES (CARRYING CAPACITY) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 472): operative April 11, 1958. The Regulations of 1954 (S.I. No. 1612; [1955] Crim.L.R. 54), are amended so as (1) to prohibit standing passengers on any public service vehicle with a seating capacity for 12 passengers or less which first obtains a certificate of fitness on or after April 11, 1958, unless it is a vehicle specially constructed or adapted for the purpose of carrying standing passengers; and (2) to restrict to a maximum of 15 the number of passengers carried on public service vehicles with a seating capacity of 12 passengers; and proportionately to reduce the maximum capacity of such vehicles with a seating capacity of less than 12 passengers.

For penalties for contraventions, see section 113 of the Road Traffic Act, 1930.

PUBLIC SERVICE VEHICLES (CONDITIONS OF FITNESS) REGULATIONS, 1958 (S.I. No. 473): operative April 11, 1958. The 1941 Regulations (S.R. & O. 1941, No. 514), as amended by the amending Regulations set out in the Schedule, are consolidated with further amendments, so as to prescribe the conditions to be satisfied by a public service vehicle before a certificate of fitness can be obtained. Certain of the changes relate only to vehicles first registered on or after April 1, 1959 (namely, regulations or parts of regulations 7, 11, 23, 25, 26, 27, 28, 30, 32, 35, 36, 43, 44 and 48); and certain exceptions are included for vehicles with a seating capacity for not more than 12 passengers (namely, regulations 8, 11, 14, 17, 32, 33, 35, 36, 43, 44 and 47).

For penalties for contraventions, see section 113 of the Road Traffic Act, 1930.

Road Traffic

PEDESTRIAN CROSSINGS (ENGLAND AND WALES) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 305): operative March 15, 1958.

The principal Regulations (S.I. 1954, No. 370) are amended (a) by revoking Regulation 9 which specified the penalty for contraventions of certain of those Regulations, and which has been superseded by section 46 (4) of the Road Traffic Act, 1956; (b) by providing that where an uncontrolled crossing is established on a road on which a speed limit of 30 m.p.h. or less is not in force, the pattern of studs indicating the approach to that crossing may until June 15, 1958, and thereafter shall be placed not less than 70 nor more than 80 feet from the nearer line of studs marking the limits of the uncontrolled crossing; and (c) by making consequential alteration to the power of the appropriate authority to modify or dispense with the requirements for marking the approach to uncontrolled crossings.

PEDESTRIAN CROSSINGS (AMENDMENT) (SCOTLAND) REGULATIONS, 1958 (S.I. No. 310): operative March 15, 1958. The principal Regulations are amended in their application to Scotland in exactly the same way as that set out in respect of S.I. No. 305, above.

Supreme Court of Judicature

ASSIZES (NORTHERN CIRCUIT SPRING ASSIZE) ORDER, 1958 (S.I. No. 424): operative March 21, 1958. An Order in Council made on January 24, 1917 (S.R. & O. 1917, No. 118), which united the Northern and Salford Divisions of Lancashire for the purpose of the spring assizes, is revoked.

Theatre and Cinematograph

CINEMATOGRAPH FILMS (RENTERS' LICENCES) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 309): operative April 1, 1958. The Regulations of 1948 (S.I. 1948, No. 633) which provided that the fee payable for a renters' licence should be five guineas, is amended so as to increase that fee to ten guineas.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

44. *Prevention of Crimes Act,* 1953, *section* 1

After an altercation at his home with a man, who subsequently left the house where the altercation had taken place, a youth picked up a large jack-knife in the presence of his mother and ran into the street with it avowing that he would inflict some bodily injury on the said man.

The mother sent for the police and a wireless-car crew attended. After searching the area with negative result the police returned to the youth's home when it was discovered that he had returned home without being able to trace the man he intended to attack.

On being questioned the youth produced the knife and admitted that if he had been able to find the man in question he would have used the knife on him but this was whilst in a rage which had since cooled.

Do you consider the circumstances disclose an offence contrary to section 1 of the Prevention of Crimes Act, 1953, having regard to the words "has with him in any public place any offensive weapon"?

My contention is that from the time he entered the street until he returned home he was committing this offence and provided there is sufficient proof as in this instance I see no reason why proceedings should not be taken if so desired. It has been suggested that as the youth was not found in a public place with the weapon the offence is not complete. [L. W. P.]

ANSWER

I think there is no doubt at all that this man committed an offence contrary to section 1 of the Prevention of Crimes Act, 1953, and that proceedings could be taken against him if it was thought proper to do so.

The elements of this offence are quite simply (1) being in a public place (which means any place to which the public have access whether on payment or otherwise, and expressly includes any highway) (2) having an offensive weapon (which means any article specially made or adapted for use for causing injury to the person *or* any article which the person having it with him intends to use for the purpose of causing injury to the person) and (3) having no reasonable excuse. " Reasonable excuse " can be shown where the person is carrying the offensive article for some legal purpose even if he suddenly decides to use it for the purpose of causing injury to the person. Thus in *R.* v. *Jura* [1954] 1 K.B. 503 ; [1954] Crim. L.R. 378, a man using a rifle at a shooting gallery who lost his temper and fired at a woman was held to have a " reasonable excuse " for possession of the rifle.

In the case posed in the question it is clear that the man concerned had an offensive weapon in a public place without lawful excuse. The offence is therefore complete ; and there is nothing in the Act which renders the offence incomplete unless the offender is actually caught in a public place at the time the offence is being committed. [M. D.]

Books and Periodicals

Reviews:

The Advocate's Devil. By C. P. Harvey, Q.C. London: Stevens & Sons, Ltd. 1958. xi and 166 pp. (12s. 6d. net.)

Mr. Harvey has already shown himself to be one of the very few successful practitioners whose opinion of "our lady the Common Law" stops considerably short of idolatry. In this entertaining and witty book he emerges garbed as an iconoclast determined to destroy the cherished illusions which enable lawyers to retain their own respect if not that of others. To Mr. Harvey, the advocate "is a necessary evil . . . it is fortunate that people are born whose moral standards are sufficiently flexible to enable them to practise his calling"; judges "are made of human clay" with various symptoms of "occupational infirmity," who have to be handled by a "technique of sycophancy" sometimes involving "extravagances of boot-licking"; and our "slap-dash, disjointed and inconsequent" rules of evidences are "founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars, and that all documents are presumptively forgeries," and have become "less of a structure than a pile of builders' debris."

All this (and more) will shock some and delight others. Most of us will probably react like Lord Monckton who, in a felicitous foreword, says that though he approves of much he disagrees with some of Mr. Harvey's views, but thinks that this blast of fresh air will do us good. Certainly the tone of this book is a refreshing contrast with the customary panegyrics about the perfection of English law. Mr. Harvey quotes a particularly nauseating example of these and comments: "It would be nice if you could say that you had never heard such nonsense in your life. But you can't, because you have." If we hear such nonsense slightly less often in future Mr. Harvey will have earned our undying gratitude.

Lest these quotations should have given the impression that Mr. Harvey is a real revolutionary, it is only fair to him to emphasise that he is nothing of the kind. He is relatively free from one "occupational infirmity" of the English legal profession (hypocrisy) but he is deeply imbued with two of the others (conservatism and complacent insularity). Thus he has no doubt about the virtue of the divided profession or of the superiority of the English legal organisation to that of other countries such as the U.S.A. He may be right about that, but I found his arguments here the least convincing part of the book. He says, for example, that it is essential for the ascertainment of truth that a witness should be examined by someone other than the person who has prepared his proof of evidence, and that this is a sufficient justification of the division of the profession into two branches. If this premise is correct the rest of the civilised world is sadly at fault. But so are we, for in the vast majority of cases in county and magistrates' courts the witnesses will be examined by the solicitor who has prepared the proof (Mr. Harvey seems to be a victim of the common delusion that barristers have a monopoly of advocacy whereas in fact far more of it is undertaken by solicitors). Nor does he explain why, if absence of contact between counsel and witnesses is so important, the salutary rule has no application to the most important witnesses of all, the parties themselves.

In fact Mr. Harvey proves not to be an iconoclast after all. He is mischievous and disrespectful (which is a pleasant change) but not really destructive. After cocking snooks for six chapters he comes docilely to heel in the seventh and final one. "There is no doubt," he says, "that my generation of practitioners has witnessed an amelioration of judicial behaviour at all levels which has had excellent effects all round." Well, maybe. But is it not a fact, apparent to all who frequent the courts, that judicial behaviour at all levels still leaves much to be desired at times? He adds that "young men now coming to the Bar . . . will find that the profession is no longer so disreputable as it is generally accounted." Probably it never was. But why is it that fewer and fewer young men are coming to the Bar at all?

L. C. B. G.

Books Received:

Teach Them to Live. By Frances Banks. Foreword by the Rt. Hon. Lord Birkett. London: Max Parrish & Co. 1958. 277 and (bibliography and index) 10 pp. (30s. net.)

Crimes Discreetly Veiled. By F. J. P. Veale. Foreword by the Rt. Hon. Lord Hankey, G.C.B., G.C.M.G., G.C.V.O. London: Cooper Book Co. 1958. 237 and (index) 4 pp. (15s. net.)

Die Wandlungen der Tatbestandslehre seit Beling. By Heinrich Schneikert. Freiburg: Verlag C. F. Muller, Karlsruhe. 1957. 158 and (index) 5 pp. (9 D.M.)

Readers' Digest:

False imprisonment: False imprisonment and the police: *The Police College Magazine,* Vol. 5, 156.

Homicide: Diminished responsibility: 225 *Law Times* 123.

Police: Policy advocacy: *The Police College Magazine,* Vol. 5, 115.

Road traffic: Silencers: 66 *Police Review* 217.

Sentence: "Excessive" and "oppressive" sentences: 1958 *Scots Law Times* 49.

Sentence: "Three times punished for one offence": 108 *Law Journal* 198.

THE CRIMINAL LAW REVIEW

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Editorial

Principles of punishment

During the past fifteen months we have published, from time to time, reports of appeals against sentence heard in the Court of Criminal Appeal. These collections of reports, published under the heading " Principles of Punishment," have tended to become unwieldy and out of date, and we have, therefore, decided to make the series a monthly feature, which will now be found following " Case and Comment." Mr. Henry Palmer will continue to report these cases for us, and the feature will adhere to the principles stated at its inauguration, for which see [1957] Crim.L.R. 141.

We hope that our readers will find that this monthly bulletin keeps them up to date with the practice of the courts in this field.

Radar for detecting speeding

Let us move with the times by all means and if we can avoid merely moving sideways so much the better. In two notes last year [1] we expressed doubts as to the usefulness of radar speed meters. Many of these doubts have now been stilled by the informative article at p. 349, *post*, by Mr. J. M. W. McBride, who has had considerable experience with this equipment ; he has been called regularly by both the Royal Ulster Constabulary and the Lancashire County Constabulary to give expert evidence in cases where the value of the equipment has been challenged by the motoring associations. The charge that radar speed meters are ineffective under conditions of heavy traffic is, however, only partly answered. In these conditions, the radar speed meter appears to be no more (and no less) effective than the older methods of detecting speeding motorists. But as it is under conditions of heavy traffic that exceeding the legal speed limit is most dangerous, it is to be hoped that, as Mr. McBride suggests, increased experience in operating the equipment will remove the necessity for confining activity to the detection of single vehicles on otherwise deserted roads where, the motoring public is convinced, the offence is purely technical.

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[1] [1957] Crim.L.R. 499, 564.

Gas meter thefts and gas poisoning

Further to our note at [1958] Crim.L.R. 276, we have received a copy of the indictment against William Finnegan in the case in question. The indictment charged that Finnegan did " culpably and recklessly wrench a prepayment gas meter from a shelf and break the pipe supplying coal gas to said meter and . . . did cause coal gas to escape from said pipe to the danger of the lieges and particularly to the danger of [here followed the names of the victims] and coal gas entered said house above and was inhaled by said [victims], and said John Nisbet and said Alexandra McGill Nisbet died from carbon monoxide poisoning as a result thereof and [Finnegan] did kill them."

The principal point which emerges from the wording of the indictment is that the recklessness and culpability are annexed to the removal of the meter, not to the killing. As our correspondent points out, any conduct which displays an utter disregard for the safety of others is criminal; it is not necessary in Scottish law to prove actual foresight of the consequences, culpable homicide may be constituted by " the doing of an unlawful act where death could not reasonably be foreseen as the probable consequences of the act " (Macdonald, *Criminal Law of Scotland*, p. 96).

Our correspondent goes on to say that, if it could have been proved that the accused knew that there was a sleeping family in the house above and that the gas was likely to reach them, Finnegan might have been charged with murder on the ground that, by his wilful act, he displayed " such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences " (*ibid.*, p. 89).

Parliament

Chief constables

Following his question to the Home Secretary on March 27 (see [1958] Crim.L.R. 277), Mr. Godfrey Lagden, Member of Parliament for Hornchurch, put a motion to the House of Commons " That an inquiry is desirable into the personal powers, capacities and previous training which influence the selection and appointment of chief constables, having regard to their far-reaching authority and their relations with Her Majesty's inspectors of constabulary and the public in general."

The motion was ruled out of order by the Speaker on the ground that Mr. Lagden's motion exceeded the terms of the notice which he had given. When asked by Mr. Lagden what machinery could be used to bring any questions affecting provincial police before the House of Commons, the Speaker said that, as the question of bringing local police forces under the control of a Minister would involve legislation, the only advice he could give was that the Member should proceed by way of a Bill (H.C. Debates, Vol. 586, col. 1298, April 25).

Judicial appointment

Mr. Clive Stuart Saxon Burt, Q.C., has been appointed a metropolitan magistrate in succession to Mr. John Fitzgerald Marnan, Q.C., who has resigned for personal reasons.

Criminal Science Notes

Modified fingerprints

This has often been tried by criminals to try to escape detection. Several methods of dermabrasion have been tried, using various abrasives, such as pumice block and powder, with and without weak alkali. The modern method recently described in *The Times* and elsewhere, said to originate at Tulane University, New Orleans, in which a revolving wire brush is used as the abrasive agent, has certain advantages if used skilfully, since it can give rise to ridges and grooves quite different from the original. I personally have not met it in this country. [J. B. F.]

Phosphorus poisoning

The ' Windy Nook " murders, in which yellow phosphorus, in the form of rat poison, was used, has again raised the question as to whether materials containing free yellow phosphorus should be available to the public as rat or insect poisons ; the same question arose after the Merrifield case in which rat poison was also used.

In both these cases yellow phosphorus was detected, but in other cases free phosphorus may not be detected, even though clinical history strongly points to phosphorus. Once the phosphorus is absorbed it is rapidly oxidised, and detection becomes more difficult, and experience and skill even more essential.

In some cases, where clinical history points to phosphorus poisoning but is followed by apparent recovery, and then a sudden fatal collapse, the phosphorus may not be detected.

This case shows again the value of pathologists experienced in forensic work. See also [1958] Crim.L.R. 71. [J. B. F.]

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Radar Speed Meter [1]

By J. M. W. McBride, B.SC., A.M.I.E.E.
Light Electrical Engineering Department,
The Queen's University, Belfast

The introduction of the radar speed meter as a means of enforcing observance of the speed limit has been widely criticised on many grounds.

To justify its adoption it is necessary first to explain in some detail how this equipment works, the way in which it is used and tested, and the factors which determine its accuracy. Before proceeding to do this it may be of some interest to examine the extent to which it has been used outside the United Kingdom.

History

The story begins in the United States of America where radar speed checking was first introduced about eleven years ago. It is now used by over five hundred police departments in forty-three states, in all the provinces of Canada and in three states in Australia. It has also been used in Bermuda and New Zealand.

It has been used in the United Kingdom for some time by the Department of Scientific and Industrial Research at the Road Research Laboratory in Slough. The first police force to adopt it for speed limit enforcement duties was the Royal Ulster Constabulary in Northern Ireland, who put it into service on October 22, 1956. For the first fortnight offenders were cautioned but on November 5 the first case was reported for prosecution and came to court on the 19th of that month. On the evidence presented the driver was convicted and fined.

The Lancashire County Constabulary adopted the radar speed meter and commenced detection on August 1, 1957, after a period of cautioning. The first case was heard in Leyland on August 19 and resulted in a conviction. Three cases adjourned from this sitting were defended by the motoring associations at a special court in Leyland on October 3 when all three cases were found proved and fines imposed.[2] One of these cases was appealed against with the backing of the R.A.C. and the appeal was heard before the County Sessions Appeal Committee on October 30. After a lengthy hearing the Committee dismissed the appeal, which was based on lack of weight of evidence.

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[1] The author is indebted to the Royal Ulster Constabulary for permission to reproduce photographs of the equipment, and to the Lancashire County Constabulary for supplying the accident statistics quoted below and for permission to refer to the work carried out in their Radio Branch on the question of interference and battery voltage effects.

[2] See [1957] Crim.L.R. 499, 564.

The latest developments have been the adoption last January of the speed meter by the Metropolitan Police Force in London and by the Durham County Constabulary in February.

The equipment

The speed meters in use in the United Kingdom are, at the moment, all of American manufacture as no British-made equipment has been obtainable. This situation will shortly be changed as a leading British manufacturing company have just produced a prototype radar speed meter of their own design.

The American equipment so far used is shown in the photographs and consists of three units, the transmitter-receiver unit, the indicator and the six-volt car battery which provides the power to operate the equipment. (*Fig. 1*).

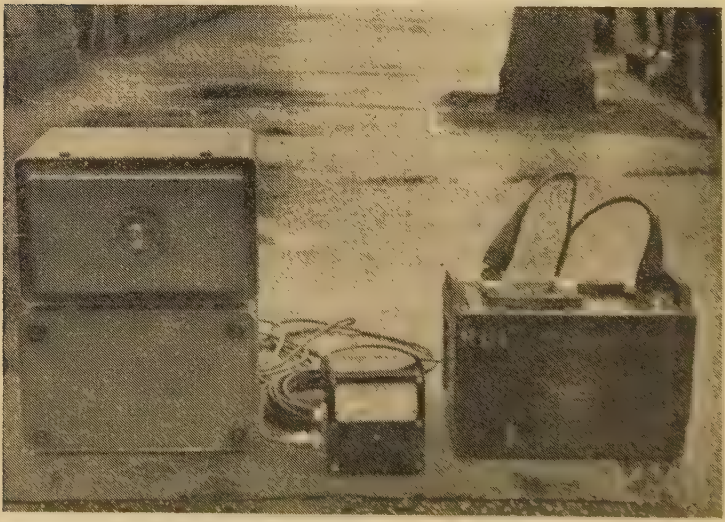

Fig. 1. The complete equipment. From left: Transmitter-receiver unit. Indicator, 6-volt battery.

The basis on which the speed measurement rests is a general physical principle known as the Doppler effect. The commonest example of this is the change of pitch of the whistle on a railway engine when it passes an observer at the side of the railway track. As the engine approaches the pitch of the whistle is high, but drops abruptly as it passes by and is then moving away from the observer. The effect is the more apparent the greater the speed of the train. The whistle radiates a sound wave consisting of alternate high and low pressure regions which travel through space at a fixed velocity (for any given atmospheric conditions). This velocity is quite independent of the motion of the engine. However, the pitch of the sound wave, which is the rate at which the compressions or rarefactions reach the ear of the observer, does depend upon the motion of the source. A little thought will show that, when the source is moving towards the observer, the high pressure regions will be somewhat more closely spaced than if the engine were stationary. Therefore they will arrive at a slightly greater rate and so the pitch of the whistle is increased. If the engine is moving away from the observer then the spacing between the high pressure regions, known as the wavelength, is increased and so the rate of arival at the observer's ear is correspondingly reduced so that he hears a lower-pitched whistle. For the change of pitch to be perceptible it is clear that the speed of the railway engine must be an appreciable fraction of the speed of sound, which is approximately 720 m.p.h.

The radar speed meter uses radio waves instead of sound waves, and these travel at the enormous speed of 186,000 miles per second. The speed of the vehicle is now almost negligible by comparison, but the Doppler shift of frequency still takes place. To make this shift measurable the frequency of the radio wave must be made extremely high. In the equipment shown the frequency is 2,455 million cycles per second, written as 2455 Mc/s. An electrical oscillation at this frequency is generated in the transmitter-receiver unit and used to supply an array of aerials. This is not visible in the photographs, being hidden behind the protective plastic lid bearing the maker's trade mark. This aerial system radiates a narrow invisible beam approximately 20 degrees wide. When this strikes a moving vehicle, it sets up electric currents in the metal parts of the body, radiator, etc., at a frequency which is very slightly greater, or less, than that of the wave radiated by the speed meter, due to the relative motion of the vehicle towards, or away from, the stationary speed meter. The metal parts of the car act as an aerial, albeit a rather inefficient one, which is energised at this new frequency. Some of the energy re-radiated is absorbed by the aerial of the speed meter, but because of the relative movement of the vehicle with respect to the speed meter, the frequency of the received wave is not the same as that of the currents induced in the vehicle being detected. It is slightly greater or less by a second Doppler shift. The two shifts are equal and always add. In the transmitter-receiver unit the received signal frequency is compared with the original transmitted frequency and the difference is measured. This is directly proportional to the speed of the vehicle towards or away from the speed meter, and the result is displayed in miles per hour on the scale of the indicator, a close-up of which is shown in the photograph. (*Fig. 2.*)

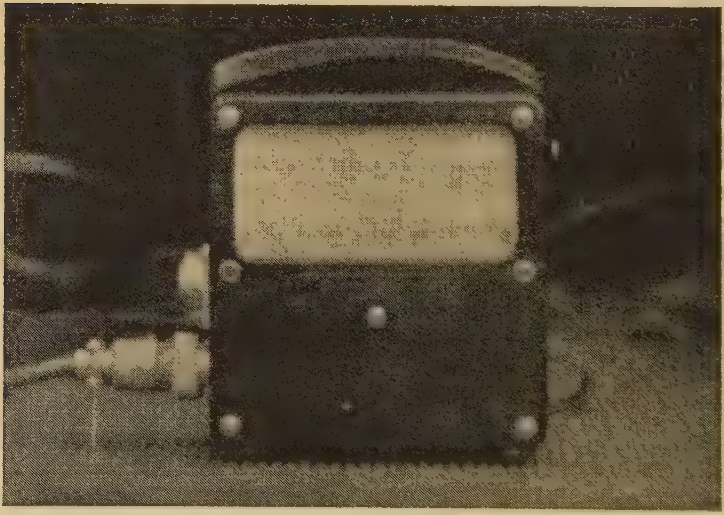

Fig. 2. The Indicator.

This scale is evenly calibrated from 0 to 100 m.p.h. with a calibration every 2 m.p.h.

Installation, Testing and Operating Procedure

There are several possible ways of positioning the equipment for speed measurement. The most usual is that shown in the photograph. (*Fig. 3.*) As can be seen, the transmitter-receiver unit is placed in the open boot of the detector car, raised up, if necessary, on a box or other support to an effective height of three feet above the road surface. Greater heights give increased range which is an embarrassment, lesser heights reduce the range, which gives the operator less time to take his readings. The unit is pointed at a slight angle to the road so that traffic in the near lane is in the centre of the beam. Errors in this alignment merely alter the effective range without affecting the accuracy, and the alignment is not in the least critical.

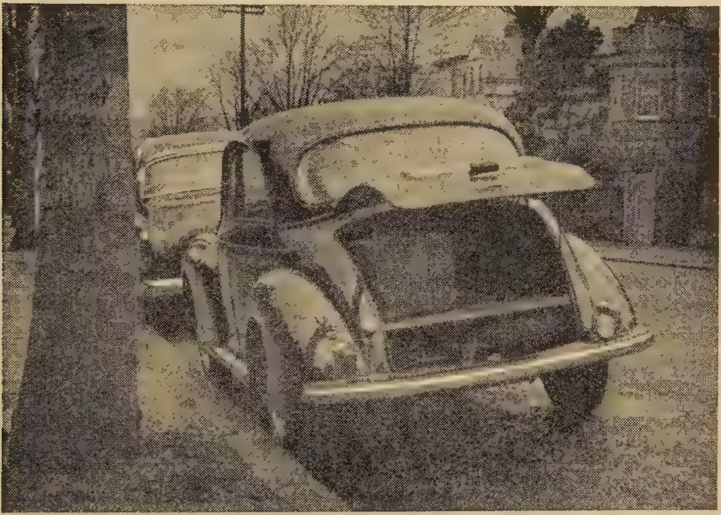

Fig. 3. The equipment in position for speed checking.

The battery can also be stored in the boot alongside the transmitter-receiver unit, whilst the indicator is usually taken inside the detector car and placed in some convenient position such as the top of the rear squab.

Before the equipment is put into action on any particular day it is first taken to a convenient stretch of unrestricted road and set up in the manner just described. It is switched on and allowed to warm up. Meanwhile the "stopper" car speedometer is checked for accuracy by driving the car at constant speeds of 30, 40, 50 and sometimes 60 m.p.h. over an accurately measured distance suitably marked by posts or paint marks on the kerb. The time taken is measured on a stop watch which has been certified as accurate by comparison with a chronometer. If the calculated speeds are found to check accurately with the car speedometer reading, the " stopper " car is then driven against the radar speed meter at the same standard speeds. If the results agree the equipment is taken and set up again on the selected stretch of restricted road.

A second method of checking the radar meter employs tuning forks. A series of these forks is provided, each designed to vibrate at a frequency equal to the double Doppler shift corresponding to a certain vehicle speed. The forks used have frequencies corresponding to 30, 40, 50 and sometimes 60 m.p.h. When one of the forks is struck and held near to the speed meter aerial the indicator shows the appropriate speed reading if all is working correctly. This test checks everything except the accuracy of the frequency of the radiated wave. Checking with the tuning forks is continued throughout the period of operation, when the road is clear of traffic, and again immediately after a detection.

As soon as possible after suspending operations for the day the initial detailed checking procedure is repeated, first testing the " stopper " car speedometer against a stop watch over a measured distance, then testing the speed meter against the speedometer. This method of testing has been criticised in court as being different from that laid down in the instruction manual which specifies two tests. The first is a measurement of the radiated frequency using a wave meter. The second, which duplicates the tuning fork test, involves introducing an artificial double Doppler shift frequency into the equipment from a low frequency oscillator. It should be stressed that these tests cannot be satisfactorily carried out on the road, but must be made in a suitably equipped laboratory. The second test involves partial dismantling of the equipment. The road tests just described are a complete and sufficient test of the accuracy of the speed meter.

In making detections the police officer's experience will usually allow him to assess with reasonable accuracy whether an approaching vehicle is travelling at excessive speed. If this is confirmed by the speed meter he passes a pre-arranged signal to the " stopper " car and then enters the speed and registration number in his notebook. He then proceeds to the vehicle which has been halted further down the road by the uniformed officer in charge of the " stopper " car. He informs the driver that his speed has been measured by the radar speed meter as being a certain value and that he will be reported with a view to prosecution. The usual details are noted and the driver is free to proceed. (This is the procedure in Northern Ireland, elsewhere the routine may differ in some respects.)

Comparison with other methods

The two main methods of detecting speeding offences used before the introduction of the radar speed meter were by timing the vehicle over a measured distance, and by the pursuit method in which the vehicle is trailed by a patrol car or motor cycle having an accurate speedometer.

The first method requires three police officers. One at the start and one at the finish of the measured stretch of road, and the third to flag down the offender. This method can only be applied on a stretch of road providing uninterrupted vision between adjacent police who must normally be separated by at least a quarter of a mile. This difficulty might be overcome by the use of a short-wave radio link. The accuracy depends on human reaction times and though the effect of these may be reduced by increasing the distance this limits the choice of sites.

The second method is still largely used, and it is doubtful if it will ever be completely supplanted by the radar speed meter, but it has several disadvantages. The speed can only be accurately measured if the patrol car or motor-cycle maintains a fixed distance from the offender. If the speed is high this involves two vehicles travelling at dangerous speed instead of only one. An observant driver will very quickly spot his " tail " and reduce speed. While this is all to the good it leads to the situation where a driver can feel free to exceed the speed limit if he so desires, provided he makes sure that he is not being trailed by a police car. The motor-cycle patrol can avoid this by taking up station in the " blind spot " where the driver cannot see him unless he has an additional external mirror. This is, however, an essentially dangerous procedure liable to lead to accidents.

The radar method has the advantages of being extremely mobile, independent of the human factor at least to the same extent as that involved in reading a speedometer, and does not add to the hazard already inherent in the excessive speed of the offending vehicle. Its extreme mobility coupled with its inconspicuous appearance, although this is in no way disguised, make it a powerful deterrent to potential speeders. This last aspect is, in the writer's opinion, the greatest single argument in favour of extending its use. Finally, despite what its critics would have us believe, its accuracy is more than adequate for the job it has to do.

Accuracy

The manufacturers of the equipment being used at the present time claim an accuracy of ± 2 m.p.h. In the experience of those closely concerned with the operation of the speed meter this claim is fully justified, but the importance of this matter warrants further discussion. In principle, the accuracy depends on six factors. These are:

(1) The stability of the radio frequency oscillator in the transmitter which generates the radio wave radiated from the aerial system. The nominal operating frequency is 2455 Mc/s. Any variation from this value will produce a proportional error in the indicated speed. Thus the departure from the nominal value would need to be 24·55 Mc/s to produce a 1 per cent. error in speed reading.

(2) The stability of the internal high voltage supply to the amplifiers and limiters in the equipment.

(3) The stability of a capacitor element in the receiver unit which converts the double Doppler shift frequency into a direct voltage proportional to the vehicle speed.

(4) The stability of the circuit which converts the direct voltage mentioned above into a pointer reading on the indicator.

(5) The relation between the relative speed of the vehicle towards the speed meter and the true speed of the vehicle along the road.

(6) A parallax error due to the operator viewing the indicator pointer obliquely.

These are the possible sources of error. They will now be considered individually as follows:

(1) This is taken care of in the design of the equipment, as the oscillator frequency is determined by the dimensions of a cavity resonator. The material from which this cavity is made has an extremely low temperature coefficient of expansion and so changes of dimensions are very small. The departure from nominal frequency is not likely to exceed 0·1 per cent. and the error in indicated speed due to this effect will be within the same limits.

(2) The voltage in question is stabilised by special voltage regulator valves and the error resulting from normal changes in battery voltage will be very slight. This factor is, however, the main one in the overall error.

(3) The capacitor element is specially chosen for its stability

with time and temperature change. The estimated error from this cause will be of the same order as under (1).

(4) The stability of the indicator controlling circuit is very high due to a balanced construction. Any change in this circuit is evident to the operator by the resulting slow drift of the indicator pointer away from zero when the road is clear of traffic. If the pointer is restored to zero the error is eliminated, at least for small drifts of 1–2 m.p.h. Larger drifts require re-balancing of the circuit which can be done in the maintenance laboratory.

(5) If the radar speed meter is sited too far back from the carriageway then the relative speed of the vehicle towards or away from the speed meter, which is the quantity indicated by the equipment, becomes appreciably less than the true vehicle speed. This error therefore always favours the motorist.

(6) The parallax error, under the worst conditions, amounts to about ± 2 m.p.h. With only moderate care in reading this is reduced to less than ± 0·5 m.p.h.

Criticisms

In the small number of cases which have so far been contested in the courts in the United Kingdom the defence has relied upon a variety of arguments. The most important of these are as follows:

(1) *Interference.* It has been stated that readings can be influenced by certain external factors, such as thunderstorms, corona discharge on power lines, electric bells, motors, fluorescent lights, diathermy apparatus, amateur radio transmitters, police radio transmitters, and radar transmitters.

The Radio Branch of the Lancashire County Constabulary has carried out extremely careful and exhaustive tests on this question and has ruled out all but the last three named sources. These tests have shown that spurious readings can be produced by a V.H.F. amplitude modulated transmitter operated in close proximity to the speed meter aerial system. These readings are erratic, varying with the speech input to the transmitter microphone, and disappear completely if the distance between the transmitter and speed meter is increased beyond about five yards. These effects are very much less when the transmitter is of the frequency modulated type as used in some police radio systems.

Interference from amateur transmitters, if experienced, would arise solely from amateur stations operating in the frequency band 1215–1300 Mc/s and 2300–2450 Mc/s. Very few amateurs are currently using these frequency bands and interference from this source would only arise if the detector car were sited a very short distance from the amateur station. The effects of this type of interference could not be mistaken for a genuine speed reading which produces a steady indication.

Radar transmitters operating in the 3000 Mc/s frequency band can produce a steady reading, the actual miles per hour shown on the indicator being related to the rate at which pulses are emitted from the radar transmitter. The range at which such interference will cease to affect the accurate measurement of vehicle speed depends upon the power of the radar, but a conservative estimate, based on the tests referred to above, is about one and a half miles. The presence of such interference will be evident, as readings will occur at intervals in the absence of any traffic. The location of most such radar transmitters, though not all, will be fixed and known to the police.

(2) *Liability to intermittent faults.* Some critics of the radar speed meter have held that the circuits and components involved are liable to intermittent faults which may occur at any time and then disappear when the equipment is being checked. This is a difficult problem, but frequent checking using tuning forks should eliminate this possibility beyond all reasonable doubt.

(3) *Effect of battery voltage.* The accuracy of the equipment, as previously mentioned, is dependent to a small degree on the battery voltage. Tests carried out by the Radio Branch of the Lancashire County Constabulary have proved that, within the manufacturer's limits of battery voltage, the specified accuracy remains unaffected. In this connection, it is normal practice to use a freshly charged battery each day, the one last used being put on charge ready for use on the following day. The Royal Ulster Constabulary provide their operators with a heavy-duty battery tester which measures the battery voltage on load. In addition to this check, the batteries are replaced by new ones at intervals of six months, or less if necessary.

(4) *Indication too brief.* It has been stated on many occasions by representatives of the Automobile Association and others that the indicator needle does not remain steady for long enough to allow the operator to take a reliable reading. They have claimed that the reading persists for only 0·7 second at a speed of 40 m.p.h. In fact the actual figure is 3·4 seconds, a very different matter. At 30 m.p.h. the duration is 4·6 seconds and at 50 m.p.h. it is 2·6 seconds. These figures relate to an average size of car but they change only very slowly with the size of the vehicle.

(5) *Speed measured over a limited distance.* The effective range of the equipment is about 60 yards when measuring the speed of an average car. This figure might be reduced to 35–40 yards for a light motor-cycle and increased to 80–100 yards for a large vehicle such as a double-decker bus. It is argued that the excessive speed which is the subject of the prosecution might be in the nature of a momentary aberration on the part of the driver. The answer to this is that the police officer operating the equipment has the vehicle under observation for a much greater distance and is able to tell if there is any marked acceleration or slowing down on the part of the offender. Also, the prosecutions so far taken have all been for speeds considerably in excess of the legal limit.

(6) *Ineffectiveness under conditions of heavy traffic.* If only one vehicle is within effective range whilst a reading is being taken there can be no ambiguity. If there are a number then it may not be easy to decide which one is producing the indicator reading at any one instant. However, if the indicator shows an excessive speed, then the speed of the fastest vehicle cannot be less than this, since the speed meter can respond to the speed of only one vehicle at a time. It can never add speeds. There would thus seem to be a good case for a prosecution in an instance such as this.

If the speed meter is used in the reverse direction to normal, so that it is measuring the speed of receding vehicles in the near lane, an unambiguous reading can be obtained while the vehicle is close to the speed meter and the reflected signal is thus a strong one.

It is considered that, with increased experience in operation, it will not be necessary to adhere solely to the detection of single vehicles on an otherwise deserted road.

Results achieved

In the Lancashire County Constabulary Area accident figures for the period January to July, 1957, the period immediately preceding the introduction of the radar speed meter, show an increase of 5 per cent. over the same period in 1955. The year 1956 has been omitted as the effects of petrol rationing make a fair comparison impossible. Radar speed checking was introduced on August 1, 1957 and the accident figures for the period August to December, 1957 were 5 per cent. *less* than for the same period in 1955. The overall effect is thus roughly a 10 per cent reduction in the number of road accidents, assuming that the upward trend during the first seven months would have been maintained but for the advent of the radar speed meter.

Similar results have been obtained in Northern Ireland.

Conclusion

From what has been written in this article it should be clear that the radar speed meter, properly used, is both a fair and effective deterrent to the use of unlawful speed on the road. It is felt to have many advantages over other methods and but few limitations.

However, it is also clear that no deterrent can be more than a partial answer to the problem of the rising toll of the road. Education of all road users, motorists, cyclists, pedestrians and especially children, continues to be the brightest hope for the future.

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1958

Automatism and Involuntary Conduct

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While the recent decision of the Divisional Court in *Hill* v. *Baxter*[1] turns on a point of evidence which is of considerable practical importance, it also deals with a problem of substantive criminal law which has rarely been discussed in the past, namely automatism. It is with this and the more general problem of involuntary conduct that the present article is primarily concerned.

The material facts of the case are quite simple. The respondent had been charged with dangerous driving and with failing to conform to a Halt sign contrary to sections 11 (1) and 49 (*b*) respectively of the Road Traffic Act, 1930. The magistrates found that he was not conscious of what he was doing when he failed to stop his van at the sign and crossed a road junction, colliding with a car, and to this finding they added the words " with the implication that he was not capable of forming any intention as to his manner of driving." They accepted that his loss of memory could only be attributed to being overcome by illness without warning and they dismissed the informations. The prosecutor appealed and, after reserving judgment for nearly a fortnight " in view of the importance of this point to the criminal law,"[2] a strong Divisional Court, consisting of the Lord Chief Justice, Devlin and Pearson JJ., allowed the appeal.

After rebuking the magistrates for permitting certain medical evidence to be given by letter, Lord Goddard stated that the offences charged were of absolute prohibition; " since no question of *mens rea* enters into the offence(s)," the magistrates' finding " that the respondent 'was not capable of forming any intention as to his manner of driving' is really immaterial. What they evidently meant was that the respondent was in a state of automation " [*sic*].[3] Although to his Lordship's knowledge, " there was in fact no case in either English or Scottish law where a defence of automatism [*sic*] had been set up or been the subject of judicial discussion," he conceded " that there may be cases where the circumstances are such that the accused could not really be said to be driving at all." But, said Lord Goddard, " it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it," and the respondent had failed to discharge this burden. His evidence was " quite consistent with being overcome with sleep or at least drowsiness . . . and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop." [4]

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[1] [1958] 1 All E.R. 193; 2 W.L.R. 76; Crim.L.R. 192.

[2] *The Times*, December 7, 1957.

[3] The terms " automation " and " automatism " were apparently treated as synonymous, and were used interchangeably, by Lord Goddard. It is submitted that, in the present context, the latter is preferable to the former, which today has a recognised industrial connotation.

The other two members of the Divisional Court, while agreeing that the respondent had been wrongly acquitted, were not prepared to go as far as Lord Goddard regarding the ultimate burden of proof and reserved the point for future consideration. But both of them held that it was nevertheless incumbent on an accused person in such a case to produce some evidence, " at least prima facie evidence," that he was acting under automatism, and this the respondent had failed to do.

Whether one accepts the view of Lord Goddard regarding the ultimate burden of proof which, with respect, appears somewhat inconsistent with authority,[5] or that of the majority of the Divisional Court regarding what is usually called the " evidential " burden of proof, it seems quite clear from the facts that the original acquittal was unjustified. Moreover, from a practical point of view, there is something [6] to be said for the more stringent approach: unless a fairly heavy burden is imposed in such cases, " Everybody who has a smash will say, ' I do not remember anything about it.' " However, important as it is, this aspect of *Hill* v. *Baxter* is not as interesting, to the present writer at least, as the discussion by all three members of the court of automatism and its role in the criminal law.

Automatism and Involuntary Conduct generally

Before considering the particular problem of automatism, it is necessary to define what will be referred to in this article as automatism and it may be helpful to relate it to the more general problem of involuntary conduct.

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[4] [1958] 1 All E.R. 193, at p. 195.

[5] This aspect of *Hill* v. *Baxter* has already been well summarised in this *Review* by Professor J. C. Smith in his comments on the case: see [1958] Crim.L.R. at pp. 193–194.

[6] There is, however, one very good reason, which is discussed later in this article, for believing that automatism will not be indiscriminately employed as a defence in such cases.

Automatism is not a legal term. It is rarely employed in the courts, and never with precision, and it is not defined in any of the English legal dictionaries. The meaning of "involuntary action" which the *Concise Oxford Dictionary* gives the term is perhaps too wide to be conveniently used by a lawyer, for there are many types of involuntary action which the courts have long recognised without describing them by the name "automatism." In one passage of his judgment in *Hill* v. *Baxter,* Lord Goddard referred to "a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness,"[7] and although one cannot infer from this that he intended to limit automatism to *unconscious* involuntary action, this is the sense in which the term will be used in this article.

A person's action can be said to be involuntary when his will does not govern the movement of his limbs. Generally speaking, this may occur while he is conscious (i) if his limbs are subject to physical compulsion and cannot obey the directions of his will, (ii) if they are free of physical compulsion but his will is governed by that of another person or (iii), if one uses the term "involuntary" in its widest sense, if his limbs are free of physical compulsion and his will is not governed by that of another person but by other pressures. More rarely, involuntary action may occur while a person is unconscious and be due to a number of different causes, and this is here referred to as automatism. Admittedly, the separation in this form of conscious, from unconscious, involuntary action oversimplifies the true position by obscuring the hypnotic, twilight and fugue states and ignoring the problem of reflex movement, all of which will be very briefly considered later, but it provides a convenient framework for this discussion.

As one would expect, the courts have made some, though varying, allowance for all these types of involuntary action for "The law can not hope to deter involuntary movement . . . ; the sense of personal security would be short-lived in a society where such movement . . . could lead to formal social condemnation of the sort that a conviction necessarily entails. People whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even for custodial commitment; they do not present a problem of correction."[8] Though this argument is sound, particularly if one is not using the term " involuntary " in the third and wider sense referred to, it indirectly raises two questions: first, whether the law properly distinguishes the public health and safety problem from the correction problem and makes sufficient provision for the former as well as for the latter; secondly, whether in its present form it adequately recognises the problem of correction which may arise, not in respect of involuntary action itself, but in respect of negligence preceding it? The person who fails to take reasonable measures to prevent himself acting involuntarily and in a manner dangerous to the public presents a problem which, it is submitted, is within the province of the criminal law.

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[7] [1958] 1 All E.R. 193, at p. 195.

[8] See the commentary to Article 2 of Part I of the American Law Institute's current draft Model Penal Code at p. 119.

(A) Conscious Involuntary Action

With regard to the three forms of conscious involuntary action mentioned above, the law, though fairly well settled, is nevertheless worth examining here, at least in outline.

(i) *Physical compulsion.* This presents the clearest case for exemption from criminal liability: no question of therapy arises if a person is physically incapable of resisting another, and it is difficult, without greatly extending established principles of causation, to conceive of situations where he might be said to have been culpably negligent in allowing himself to be subjected to physical compulsion.

Thus, " If X is holding a knife and then Y seizes X's arm and by means of his greater physical strength causes the knife in X's hand to wound Z, the wounding would in early law have been held to be 'not the act of X' . . . . "[9] Similarly today, X would not be held criminally liable, almost certainly on the grounds that it was not his act, *i.e.*, that he committed no *actus reus*. There should, however, be no objection to treating the requirement of voluntariness as affecting *mens rea*, as is done in the case of duress and coercion,[10] provided it is recognised (i) that even offences of absolute prohibition, dispensing with the normal *mens rea* requirement of foresight of consequences, should not also dispense with this separate requirement of voluntariness, and (ii) that no other special consequences should flow from what is merely a question of legal arrangement, *i.e.*, from treating voluntariness as affecting the *mens rea* rather than the *actus reus* aspect of an offence.[11] Whatever the appropriate legal terminology may be, a person should not be held criminally liable in respect of any conduct he was physically compelled to perform (or, anticipating a later submission, in respect of conduct he committed in a state of automatism), even if the offence charged is absolutely prohibited or, as in the notorious case of *R.* v. *Larsonneur,*[12] penalises a state of affairs rather than a specific act. Judges ought to resist the temptation to read the offence literally and convict, even if they only intended to impose a nominal punishment or grant an absolute discharge.

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[9] Kenny's *Outlines of Criminal Law*, 16th ed. (1952), at p. 23.

[10] *Infra.*

[11] This refers to cases like *Hill* v. *Baxter* and *R.* v. *Harrison-Owen* [1951] 2 All E.R. 726, which is more fully considered below. See further the valuable discussion in Williams, *Criminal Law: The General Part* (1953), at p. 14.

(ii) *Where the will is governed by that of another person.* This presents far greater difficulties. Here the compulsion operates not on the body but on the mind, and whereas it is obvious that the law can serve no purpose in punishing a man for being physically incapable of resisting another, there may be some justification in punishing him, particularly in threatening to punish him, for his mental infirmity if he succumbs to pressure which a reasonable man would withstand. Here, as in the third type of conscious involuntary action, it is readily assumed that the threat of punishment may help him to act reasonably and withstand the pressure. Since he foresees the consequences of his conduct (for otherwise his plea, generally, is simply lack of foresight) and retains at least physical control of his movements, his liability is made to depend on whether his conduct satisfies certain objectively reasonable standards. Thus, for example, to plead duress, he must have desisted as soon as was reasonably possible; similarly, the test of reasonableness is thought to explain why the defence does not apply to murder and certain other serious offences, though one can imagine circumstances in which it may be reasonable even to kill under pressure of extreme threats.[13]

The clearest examples of this type of defence of conscious involuntary action are duress and coercion. Despite certain confusing statements in at least two recent cases,[14] it is usually accepted that persons who act under duress or coercion lack *mens rea,* rather than commit no "act," even though they foresee the consequences of their conduct. However, though the authorities indicate that both defences, particularly duress, are somewhat uncertain in scope, there should logically be no reason to doubt that they are of general application and can successfully be pleaded where the offence charged is absolutely prohibited. Indeed, most offences of absolute prohibition are comparatively so trivial in nature that relatively minor threats should reasonably justify the actions of a person charged with committing them.

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[12] (1933) 97 J.P. 206.

[13] See further, Williams, *loc. cit.*, n. 11, at pp. 592–608.

[14] *R.* v. *Bourne* (1952) 36 Cr.App.R. 125 and *R.* v. *Steane* [1947] K.B. 997.

In a sense, self-defence and defence of property are also examples of this type of conscious involuntary conduct which the law recognises as entailing no criminal liability. Like duress and coercion, these defences are subject to certain objective criteria, *e.g.*, that the force used must not be excessive in the circumstances,[15] but, unlike them, are inherently limited in scope and are treated as negativing the *actus reus*, and not the *mens rea*, aspect of the offence charged. In essence, all the defences so far discussed can be regarded as particular examples of a wider general defence of justification, available in situations recognised by the law as reasonable, which should extend, in appropriate cases, to acts committed under superior orders, or more generally, under necessity, as it already does, for example, in dealing with such problems as abortion and forcible arrest. In a sense, all of them can be said to be concerned with involuntary conduct.

(iii) *Where the will is governed by other pressures.* Unless, as in the above mentioned cases, there are factors present which ought reasonably be held to justify the actions of the accused, the criminal law does not recognise as a ground for complete exemption from liability the fact that, although he was conscious at the time, his will was governed by certain pressures and he failed to resist an impulse to commit the conduct in question. This, of course, represents the classic criminal situation and mere weakness of will affords no defence.

Even if the impulse proved irresistible, the law is generally equally stringent, though in the past judges were sometimes prepared, in view of the penalty involved, to regard an irresistible impulse to kill as a form of insanity,[16] and today such an impulse may have the effect of diminishing the responsibility of the accused, reducing his offence from murder to manslaughter. But the mere existence of a partial defence of diminished responsibility in section 2 of the Homicide Act, 1957, affords no assurance that it will be applied by a jury to the case of a man who succumbed to an irresistible impulse to kill.[17] Moreover, even if it is applied, the defence of diminished responsibility merely answers the problem of safety, since the accused is sent to prison but, theoretically at least, leaves the problem of therapy unresolved, since the offence is treated as one of ordinary manslaughter.

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[15] This almost certainly represents the present law though, surprisingly enough, it is not entirely certain whether the use of extreme force may not be held to be reasonable in situations where it is not absolutely necessary.

[16] See, *e.g.*, statements in *R.* v. *Hay* (1911) 22 Cox 268 and *R.* v. *Jolly* (1919) 83 J.P. 296 and the recommendations of the 1924 Atkin Committee contained in Cmd. 2005.

[17] This is confirmed by *R.* v. *Spriggs* [1958] 1 All E.R. 300 though the effect of that decision has, fortunately, been somewhat mitigated by the still more recent decision of the Court of Criminal Appeal in *R.* v. *Matheson* [1958] 2 All E.R. 87, holding, in effect, that a jury must not refuse to accept a plea of diminished responsibility in the face of strong uncontroverted evidence. This point is more fully discussed by the present

Any other type of irresistible impulse is, in effect, entirely ignored for the purposes of determining criminal liability. Even if the courts were prepared in practice to stretch the M'Naughten Rules to include an irresistible impulse, accused persons would rarely prefer the probability of indefinite detention in Broadmoor to the certainty of a limited term in prison.[18] Because, in short, there is in nearly all cases no lawful way of ensuring that an acquitted person will undergo therapeutic treatment and because, further, the defence of insanity is rarely invoked except in cases of murder and is, in any event, inherently restricted by the requirements of the M'Naughten Rules, the problem of therapy, which is to be found in this type of involuntary conduct, is inseparably linked with the problem of correction. Only after finding the accused criminally liable, can a court in sentencing him normally take account of the pressures which drove him to commit the offence.

(*To be continued.*)

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writer in "English Criminal Law Reform and the American Draft Model Penal Code," 11 *Current Legal Problems* (1958).

[18] Note, for example, the remarks of the Court of Criminal Appeal in *R.* v. *Binns* (1941) 31 Cr.App.R. 55.

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S. Prevezer

1958

A Scottish Newsletter

Parliament House, Edinburgh

Attempted suicide

Scots lawyers have followed with some interest the recent attempts to reform the law regarding attempted suicide, which remains an offence in England. In particular, *The Times* leader on the subject on February 26, 1958, which pointed out that there was no such offence in Scotland, and noted that " not for the first time, Scots law is preferable to the English," was read in Edinburgh with pleasure and approval. Although it is true that attempted suicide is not a crime in Scotland, it is not strictly accurate to say that the attempt never goes unpunished. Very rarely, a person who attempts to commit suicide may be charged with a breach of the peace. The Home Secretary is unwilling to institute reform on this subject because, he says, he has no evidence that the change would be " universally acceptable to public opinion." On this assertion, it is hard to resist the conclusion that public opinion on this topic must be more progressive than that in England! Attempted suicide was formerly a crime in Scotland; so said Mackenzie, the noted Scots legal historian, in 1686. It was made a crime in both countries not for any reason of theology or morality, but for fiscal reasons—the estate of the suicide being forfeited to the Crown.

It may be noted in passing that the decision in the recent suicide case—*Pigney* v. *Pointer Transport Services*,[1] where the widow of a workman was awarded damages on the death by suicide of her husband some months after receiving a head injury while at work, has not been followed in Scotland. Lord Cameron in *Cowan* v. *National Coal Board* [2] declined to follow the rule laid down in *Re Polemis* [3] regarding remoteness of damage, and held that a widow could not recover any damages on the suicide of her husband, since although the suicide arose out of the accident it could not *reasonably* have been foreseen by the employers.

Scottish criminal law reports

English lawyers who have occasion to consult Scottish criminal law reports may have difficulty in finding their way about them. In the first place, it may be useful to outline the system under which the cases are reported. Prosecutions in the burgh police courts, which are the local summary criminal courts, are conducted by the burgh prosecutor, who may also be a lawyer in private practice. In the sheriff courts, where the maximum penalty is two years' imprisonment, the Crown case is presented by the Procurator Fiscal. When such cases appear in the law reports, the names of the Fiscal and of the accused are used, *e.g.*, *Reid* v. *McNicol*. It is thus not possible to distinguish this type of case from a civil action. More serious offences (always on indictment) are heard in the High Court of Justiciary, either in Edinburgh or on circuit in the major Scottish towns. The High Court in Scotland is, of course, purely a criminal court. Prosecutions there are conducted by one of the five Advocates Depute, and are reported thus: *H.M. Advocate* v. *Rutherford*. In cases of major importance heard in Edinburgh the Lord Advocate or the Solicitor-General may appear. There is no appeal to the House of Lords in Scottish criminal cases. The ultimate appeal court is the High Court sitting as a Court of Criminal Appeal as constituted under the 1926 Act, with three or four judges present. On these occasions the judges wear the scarlet Justiciary robes instead of the purple Senatorial robes of the civil College of Justice. The Justiciary Reports (J.C.) now appear in *Sessions Cases* between the House of Lords (H.L.) and Court of Session (S.C.) reports. They are also reported weekly in the *Scots Law Times* (S.L.T.). Prior to 1917 they appeared in separate volumes under the name of the chief reporter, *e.g.*, Irvine, Adam, etc. A full list of Scottish criminal reports is published in the leading authority, MacDonald on *Criminal Law* at p. xi.

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[1] [1957] 1 W.L.R. 1121.
[2] 1958 S.L.T. (Notes) 19.
[3] [1921] K.B. 560.

A number of legal terms are used in the reports which may be unfamiliar to English readers. The accused is often referred to as " the panel " or anciently as " the pannel." This enables counsel to avoid a dangerous repetition of the phrase " the accused," or the equally ostentatious " my client "! The very descriptive English term of Manslaughter is replaced by the more clinical Culpable Homicide, known affectionately by lawyers as " Culp. Hom." A number of other crimes had picturesque names, now obsolete. Thus Hamesucken, literally—seeking a person out in his own home, consisted in the violent assault upon a person in his own dwelling, the dwelling having been entered for that purpose. It was formerly a capital offence at common law. Stouthrief was the breaking into a house, putting the inmates in fear, and taking property from their personal protection. It is now charged as robbery. When once an accused has stood trial on a charge, he has " tholed his assize " and cannot subsequently be tried again on the same offence. The term " art and part " is also used in indictments, no distinction being made between the commission of a crime and mere accession to it. Finally, the distinction between felony and misdemeanour has no place in Scots criminal law.

Diminished responsibility

A recent importation from the law of Scotland across the border into England has been the doctrine of diminished responsibility. The suggestion that there was a half-way house between insanity and complete responsibility was first canvassed as long ago as 1867 by Lord Deas in *H.M. Advocate* v. *Dingwall.*[4] Now section 2 of the Homicide Act, 1957, provides for England that where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing. The Act also laid upon the defence the burden of proving that the accused could claim "diminished responsibility." This point was taken in *R.* v. *Dunbar*,[5] the first English case in which the doctrine was considered. It was held that the standard of proof was to be taken on the balance of probabilities, and not on the "beyond reasonable doubt" standard. Lord Goddard referred with approval to the case of *H.M. Advocate* v. *Braithwaite*,[6] where the doctrine was outlined. The list of the earlier Scottish authorities cited in that case will be of value to English criminal lawyers, now that the doctrine forms part of English law.

Drivers and conductresses

The duties of drivers and conductresses towards travelling members of the public have twice been considered recently in the Scottish criminal court. In both cases, the court was concerned with a charge under Regulation 4 (*c*) of the Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations, 1936. This regulation enacts, *inter alia*, that "a driver or a conductor, when acting as such . . . (*c*) shall take all reasonable precautions to ensure the safety of passengers in or on or entering or alighting from the vehicles." In the bus driver's case, *Reid* v. *McNicol*,[7] the complaint alleged that the driver had failed to take all the reasonable precautions necessary, in that he had failed to stop the bus at a proper stopping place, with the result that an intending passenger had stumbled and injured himself while attempting to board the bus. The court refused to sustain a conviction, holding that the duty to take reasonable precautions was only owed to passengers entitled to enter the vehicle because it had stopped to pick up passengers (the complaint had failed to specify that the passenger was so entitled to enter the vehicle). In other words, " passengers entering or leaving the vehicle while in motion do so at their own risk," and the driver cannot be charged with an offence if intending passengers attempt to enter the bus before it has stopped for the purpose of taking on passengers.

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[4] 5 Irvine 466.

[5] [1957] 3 W.L.R. 330.

[6] 1945 J.C. 55.

[7] 1958 S.L.T. 42.

The bus conductress who was charged under the same regulation was not so successful. In *Marshall* v. *Clark*,[8] a conductress was charged with failing to take all reasonable precautions for the safety of a passenger, in that she rang the bell for the bus to move off from the stop while a passenger was still attempting to enter the bus. The passenger, who rejoiced under the memorable name of Mrs. Sophia Entwhistle or McGurk, fell off the bus and received injuries. The accused appealed against her conviction *inter alia* on the ground that the " reasonable precautions " desiderated were not defined, and there was no standard against which they could be tested. The appeal was refused, and dealing with the argument the Lord Justice Clerk (Thomson) said: " This proposition is on the face of it somewhat startling and would appear to accuse an omnipotent Parliament of legislative ineptitude. The ineptitude lies, according to the argument, in the failure of Parliament to point out a standard against which the negligence of the conductress can be measured." His Lordship then gave his opinion that it was quite fair that the " reasonable precautions " desiderated could be determined by the trial judge, bearing in mind the circumstances of any particular case.

Medical examination in section 15 cases

The duties of a police doctor in connection with the medical examination of a person accused under section 15 of the Road Traffic Act of driving under the influence of drink were recalled in the case of *Taylor* v. *Irvine*.[9] The three necessary preliminaries of such a medical examination were laid down in *Reid* v. *Nixon*[10] and *Farrell* v. *Concannon*,[11] as follows; the court must be satisfied (1) that the accused consented to the examination; (2) that he was informed that the results might be used in evidence; (3) that he was informed that he was not compelled to submit to the examination at all. In *Taylor* v. *Irvine*, the accused when asked whether he objected to an examination, the results of which might be used in evidence, replied that he had no objection, as he had nothing to fear. He appealed against conviction on the ground that he had not been specifically told that he was not obliged to undergo an examination. The High Court refused the appeal, holding that the accused's reply on the first matter was such that it could be inferred that he was already fully informed on the other two matters, and in that event it was not necessary to put them formally to him. The case serves to emphasise again the utmost care with which the police are required to conduct such examinations.

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[8] 1958 S.L.T. 19.

[9] 1958 S.L.T. (Notes) 15.

[10] 1948 J.C. 68.

[11] 1957 J.C. 12.

A case of lesbianism

Those unnatural practices between females to which the name of lesbianism has been given seldom feature in the law reports. In *H.M. Advocate* v. *Callander*,[12] a person accused of assaulting his wife and another woman, Mrs. O., gave evidence that he did so under severe provocation in respect that he discovered the two women indulging in lesbianism. It was contended on behalf of the accused that this discovery amounted to provocation and was a mitigating circumstance. Lord Guthrie in his charge to the jury explained that if a husband assaulted his wife on discovering her in the act of adultery, that would amount to provocation, and went on to say: "Lesbianism is not adultery, but I do not think that anyone would hold that it is a less serious infringement of the duty of a wife than adultery is, and consequently, if you are satisfied that the husband's actions were influenced by the discovery of his wife under circumstances which indicated that she was pursuing her course of lesbianism with Mrs. O., that would entitle you to form the opinion that he assaulted her and Mrs. O. under provocation." The accused was found guilty of assault and sentenced to five years' imprisonment.

When is a shop not a shop?

The answer to this conundrum appears to be—when it is a mobile shop or van. In *Cowlairs Co-operative Society* v. *Glasgow Corporation*,[13] a co-operative society carried on a retail grocery business from a mobile shop van on a piece of vacant ground in Glasgow. The corporation, acting as local authority under the

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[12] 1958 S.L.T. 24.
[13] 1957 S.L.T. 288.

Shops Act, 1950, ss. 1 and 12, had fixed Tuesday, or in the option of the shopkeeper, Saturday, as the day of the weekly half holiday. The society had opted for the Saturday closing day for their mobile shop. It was held that their mobile van was not a " shop " within the meaning of the Act, which would entitle them to select the optional half day. The shop was actually constructed on a trailer which was towed to the site every day by a mechanical power unit and was returned to a garage in the evening. The Lord Justice Clerk (Thomson) said that he could not see how under any interpretation of the facts the van could be regarded as " premises," and it was an idea underlying the definition of a shop that trade should be carried on from premises.

Wine of the times

Most crime in Glasgow, like other commercial cities, finds its origin in drunkenness. In particular, the wine-drinking orgies and methylated spirits parties of the 'twenties were notorious. A judge on the Glasgow circuit was recently hearing a case of assault following a drunken brawl at a " wine party." His Lordship gravely asked the witness whether they had been drinking cheap red wine. " Oh no, my Lord," replied the witness, with a nice sense of social history and injured dignity. " It wasn't cheap wine. It cost 5s. 9d. a bottle."

An Advocate.

Murder and the Reasonable Man

By Group Captain J. T. Lowe, ll.b., *Barrister-at-Law,*
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(*continued from* p. 298, *ante*)

Intentional consequences of an act

Mr. Turner has made a notable attempt to formulate the *mens rea* of murder, his main thesis being that the underlying conception of *mens rea* is foresight of consequences. Introducing this conception into the offence of murder he suggests that it consists in a realisation that one's conduct may cause the death of a human being.[23] Dr. Glanville Williams points out that this definition is a delineation of involuntary manslaughter rather than murder,[24] and, as he remarks, this definition allows the estimation of probabilities to creep in. Once probabilities are introduced it becomes impossible to draw a precise line between murder and manslaughter.

If the *mens rea* of murder is approached from the angle of the nature of the intentional act in its narrower sense,[25] as distinct from its intentional consequence, the strength of the objective element aided by the inevitable consequence principle can be fully appreciated. It would be very difficult if not impossible for a sane man to establish that he was ignorant of the intrinsic quality of acts which inevitably produce death or grievous bodily harm, and in a criminal trial he would never attempt to do so. The inevitable consequence principle is far too strong. If, for example, A intentionally plunges a dagger into B's body how could A possibly persuade a jury that he did not know that such an act would inevitably produce grievous bodily harm? His only hope, assuming that he is sane, would be to plead that his act of stabbing was unintentional.

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[23] Russell (10th ed.), 533. See also *Modern Approach,* where, at p. 242, he states that murderous malice may be contained in the simple statement " that the jury must be satisfied that the prisoner foresaw that his conduct might cause the death of some person."

[24] *Criminal Law*, para. 17, at 47. The inherent difficulty in the pure foresight test is that intention does not necessarily connote foresight. To take the illustration of the pistols used by Glanville Williams (*Criminal Law*, p. 47) suppose 100 pistols are lying on a table, and only one of them is loaded. A and B, knowing that only one is loaded, each selects a pistol at random, points it at C, and pulls the trigger. A intends to kill C and hopes that the pistol which he has selected is loaded. B merely desires to frighten C and hopes that the pistol which he selects is unloaded. If A happens to select the loaded pistol and kills C he is guilty of murder. What if B, however, happens to select the loaded pistol? If A's guilt depends purely on foresight of consequences, then B also is guilty of murder, since both A and B possessed precisely the same degree of foresight, but *quaere*? The essential difference between A's state of mind and that of B's is that A intentionally shot a bullet into C's body, whereas B did not; A designed the death of C, whereas B had no such design at all.

[25] By the intentional act in its narrower sense is meant, (i) a willed movement, designed to bring into operation those consequences which must inevitably result in the *further* consequence of death or grievous bodily harm, (ii) the accompanying circumstances, and (iii) knowledge that these designed consequences will result in the further consequence of death or grievous bodily harm. Let us suppose that A fires a rifle at B from a distance of half a mile, intending to hit him in a vital part of the body. Here (i) consists of the muscular contractions by which the rifle is raised, aimed at B, and the trigger pulled, (ii) consists of the circumstances that

Having said so much it is now necessary to deal with a problem of crucial importance, which was brought to the forefront in *Ward's* case. Where a person intentionally commits an act which must inevitably cause death or grievous bodily harm is it necessary for the prosecution to prove that the accused was *personally aware* of its intrinsic quality or is it sufficient to show that the ordinary ✓ reasonable man would have had this knowledge in the circumstances? We must be perfectly clear as to the exact nature of the problem involved. It involves two things; first, the accused has knowledge of all the circumstances, which according to the foresight of the reasonable man would inevitably cause grievous bodily harm or death, and secondly, that the accused denies this foresight. Let us suppose that A is beating B violently with a stick, and is perfectly aware that he is beating B with the stick. The violence and continuance of his blows are such that the ordinary man knows that they will certainly cause grievous bodily harm. Suppose A, whilst admitting that he has given these blows, denies that *he* foresaw the consequence of grievous bodily harm. Does the onus remain on the prosecution to prove that A personally appreciated that such inevitable consequence would result?

Holmes in his analysis of the *mens rea* in murder maintained that the reasonable man test applied, and put the matter with great clarity thus:

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the rifle is loaded and in working order, and (iii) consists of the knowledge that the intentional consequences, namely, the explosion of the gunpowder, the expulsion of the bullet and its entrance into B's body will result in the further consequence of death or grievous bodily harm. It is obvious from this example that whether A designed to hit B is a purely subjective question. The mental activity of A cannot be determined by the imposition of any objective standard. As to the further problem of knowledge as to whether the passage of the bullet into the body of B would inevitably result in death or grievous bodily harm is this to be judged by what A thought the consequence would be or by what the average man would have foreseen? Is the test what A contemplated as the result of his action or what a reasonable man would have contemplated?

> "If the known present state of things is that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act *knowing the present state of things* is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen." [26]

Let us take the most obvious example of this proposition. Suppose A points at B's heart a pistol which he knows to be loaded, and deliberately pulls the trigger. Here A knows the present state of things from which the man of ordinary intelligence would infer the consequence of death or great bodily harm, since he knows (1) that on pulling the trigger a bullet will emerge from the pistol, and (2) that the bullet will penetrate B's heart. Now in point of fact it is probable that no prisoner would ever dream of asking the jury to apply a subjective test as to whether he, the prisoner, foresaw the inevitable consequence of his act, assuming, of course, that he was not setting up the plea of insanity. Furthermore, the judge could very well ignore the issue as to whether the consequence was intended at all, for he could very well direct the jury in some such terms as "If you are satisfied that the prisoner deliberately fired a bullet into the deceased's heart and thereby killed him then he is guilty of murder."

Holmes' analysis has been criticised by the exponents of a subjective view [27] and it may be interesting to examine the analysis a little closely. We may take first of all Kenny's fourth and fifth propositions. As he stated them they were:

4. Intention only to hurt—and not to kill—but to hurt by means of an act which is intrinsically likely to kill.
5. Intention to do an act which is intrinsically likely to kill, though without any purpose of inflicting any hurt whatever.[28]

Mr. Turner in the sixteenth edition of Kenny has adopted these propositions, but with a significant alteration. Instead of the words "intrinsically likely to kill" he has substituted the words "an act which the prisoner realised was likely to kill." These alterations have obviously been made to fit in with his theory of foresight, and they are, of course, not merely verbal alterations but fundamental ones, since they postulate a purely subjective theory of *mens rea.* It would be platitudinous to observe that when Kenny was speaking of an act intrinsically likely to kill he was predicating that its quality as such was known, but did he intend to assert that such knowledge was to be measured by a subjective standard? If he did it is strange that he failed to make this clear, considering that his book went through thirteen editions under his own hand. In support of his fourth proposition he cited the old case of *R.* v. *Grey* (Kelyng 64) where a blacksmith hit his apprentice on the head with a bar of iron, and killed him. The court held that the use of such a dangerous instrument was all one, as if he had run him through with a sword. The question arises, however, by what standard was the weapon judged to be dangerous? Surely by an objective one. It was not for the blacksmith to consider that a bar of iron was a suitable instrument of correction, and if he thought that it was then so much the worse for his belief.

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[26] *The Common Law*, 53–4. The problem posed is mentioned in Cross and Jones at p. 38, and they say: "Although it is of great theoretical interest, the difference between the two views is not of much practical importance, because there cannot be many cases in which a jury would find that a man who knew of the surrounding circumstances rendering it highly probable that the consequences of his voluntary conduct would be fatal did not, in fact, foresee them." That it was of more than theoretical importance is shown conclusively by the decision of the Court of Criminal Appeal in *Ward's* case. There the two opposing views were squarely before the court, and on the question as to which view was correct depended the question, in turn, as to whether the accused was guilty of murder or of manslaughter.

[27] Notably by Jerome Hall in his *Principles of Criminal Law*.

[28] *Outlines of Criminal Law* (13th ed.), 136–7.

When we turn to Stephen's proposition the crucial question is whether by knowledge he meant to imply a subjective test or an objective one. The sense of the proposition is that he meant to imply a subjective test, for it is difficult to see how the act can be accompanied by indifference or a wish that death or harm may not be caused, if the person is unaware that such death or harm is threatened. But whatever the sense of the proposition may be it would certainly appear to be the case that Stephen, in fact, intended the imposition of an objective test. In the first place, in discussing the various forms of homicide he says that it is unlawful where, *inter alia,* death is caused by an act done with the intention to cause death or bodily harm, or which is *commonly known* to be likely to cause death or bodily harm.[29] Secondly, the illustrations which he gives in support of his proposition indicate that such knowledge is judged by an objective standard. To take his first illustration:

> "A waylays B, intending to beat but not intending to kill him, or to do him grievous bodily harm. A beats B, and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death."[30]

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[29] H.C.L. III, at 20.
[30] *Digest of the Criminal Law*, 8th ed., 221.

His second illustration is equally objective:

> "A, recently delivered of a child, lays it naked by the side of the road, and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A had or had not reasonable ground for believing that the child would be preserved." [31]

This second illustration is that of *R.* v. *Walters* (1841) C. & M. 164, and this case deserves closer examination. The facts were that the prisoner was delivered of a child by night on the roadside, and left it on the side of the road without any clothing or covering to protect it against the weather. It died of the cold, and the prisoner concealed the birth until she was apprehended. She was charged with murder, and Coltman J. directed the jury thus:

> "If a party so conduct himself with regard to a human being which is helpless and unable to provide for itself as must necessarily lead to its death the crime amounts to murder.[32] But if the circumstances are not such that he must have been aware that the result would be death, the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by someone else and preserved; because then it would only be the crime of manslaughter. If a person were to leave a child at the

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[31] *Ibid.*

[32] There are, of course, old cases to support this proposition, *e.g.*, the son who carried his sick father around in the open against the father's will, as a result of which he died: 1 Hawk, Chap. 31, s. 5; of the harlot who laid her child in an orchard, where a kite struck it and killed it: Crompton 24; of the mother who hid her child in a pigsty where it was devoured. These cases are cited in 1 East P.C. 226. See also the case of *R.* v. *Huggins*, 17 St.Tr. 309, which is cited by Foster at 322, where a gaoler confined a prisoner in a damp, unwholesome cell without allowing him the necessary articles for keeping the cell clean and wholesome, of which treatment the prisoner died. There are also a number of Scottish cases where murder has been held as a result of exposing children of tender years to the weather without nourishment or protection. See the cases of *Smith* and *Key*, 5 Hume i 190, and see the case of *Elizabeth Kerr* (1860) 3 Irv. 645. In the Scottish case of *McPhee*, 1935 J.C. 48, the accused assaulted a woman and left her exposed in a field unconscious, where she died. This was held to be murder.

> door of a gentleman, the probability would be so great that it would be found that it would be too much to say that it was murder if it died; if, on the other hand, the child were left in an unfrequented place what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore, it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved."

The direction begins with a statement of the inevitable consequence principle; this is then immediately qualified by the words " but if the circumstances are not such that he must have been aware that the result would be death." The obvious sense of these words is that the circumstances are such that death cannot be predicated as a certainty, but only as a possibility. The inevitable consequence principle is then again repeated, and then follows a careful balancing of objective factors. Finally, the question is left to the jury as to whether the prisoner had reasonable grounds for believing that the child would be found and preserved.

We may now take a modern case. In *R.* v. *Gibbings and Proctor*, 13 Cr.App.R. 134, the prisoners were charged with the murder of a little girl by starving her to death. In his direction to the jury Roche J. said: ✓

> " The charge against the prisoners is, in the first place, that they killed the child Nelly or caused her death by malice aforethought. That means they intended she should die, and acted so as to produce that result (in the Court of Criminal Appeal Darling J. said that this direction was too wide, and in favour of the prisoners). In dealing with that you will, of course, remember, and it is my duty to tell you, that very rarely will people say when they do such a thing that they intended to produce such a result. Sometimes they do say that they killed a person, and intended to do so, but rarely, and as a rule you have to judge of persons' intentions from their acts, they being reasonable people, and there is no suggestion here at all that either of these prisoners was in any way insane. Being reasonable people you must judge of them as understanding the nature of the act they are doing, and if you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury, as a result of which she died, it is not necessary for you to find that she or he intended to kill the child there and then. It is enough if you find that he or she intended to set up such a set of facts by withholding food

> or anything as would in the ordinary course of nature lead gradually but surely to her death."

Both prisoners were convicted of murder, and appealed on the ground that no intent had been proved. Dismissing the appeal, Darling J. said, "In our opinion that direction amply fulfils the conditions which a judge should observe in directing the jury in such a case as this." Later he said, "The jury came to the conclusion that she had done more than wickedly neglect the child; she had deliberately withheld food from it, and, therefore, we come to the conclusion that there was evidence which justified the jury in returning a verdict not merely of manslaughter but of murder."[33]

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[33] Two other cases may be noticed. In *R.* v. *Kirkham*, 8 C. & P. 116, the prisoner stabbed his son with a knife, whereof he died. In directing the jury Coleridge J. said: "With regard to malice I should tell you that it is not necessarily meant by that term that at the moment the party killing has any old or present grudge against the deceased; it is not that at the moment he takes away life he is acting on some deliberate design. It is only that the party has done the act, knowing that he does it, and that the means are such as *in all human reason* are likely to produce death. If I were to take a loaded pistol and fire into that crowd who are entire strangers to me, if I did that act deliberately, and death ensued, I should be guilty of murder. The law would say that I did it with malice prepense. I could not do it without bad feelings and a reckless heart. Every one must be presumed to intend the natural consequences of his act. If you throw a stone at a window it must be presumed that you intended to break it because it is a brittle substance. That being so, if you had nothing more than simply that the prisoner, taking a knife in his hand, had stabbed his son, that would have put on him to clear himself of murder. The words "nothing more" were used because the prisoner put up a defence of provocation.

In the case of *R.* v. *Philpot*, 7 Cr.App.R. 140, the prisoner was charged with the murder of his wife by strangling her. They had an altercation, and the evidence of the prisoner was "Something seemed to snap in my head, and I jumped up and caught her by the throat. I lost control of myself altogether, I did not know what I was doing exactly. I felt as if I was holding a strong galvanic battery, and wanted to leave go but could not." The medical evidence was that the strangulation had lasted five minutes, and was so violent that a bone in the wife's throat was broken.

The jury found that the prisoner killed his wife; that he was sane at the time; that he acted in a fit of temper, without intending to kill her. The judge then asked them in what sense they used the words "without intending to kill her," and the foreman replied, "The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing." The judge then directed the jury to reconsider their verdict, saying that a man is held to intend the consequences of his act. The jury then convicted of murder, and the prisoner appealed on the ground that after the jury had found that he did not realise the consequences of his act a verdict of murder could not be sustained, since malice was essential to murder, and the jury had negatived malice.

Dismissing the appeal Lord Alverstone C.J. said: "The real issue before the jury was whether the applicant was sane or insane when he killed his wife. The jury found that he killed her in a fit of temper; they

The nature of the weapon used

There is also, of course, the long series of cases in which a distinction has been drawn between murder and manslaughter from the nature of the weapon used. As Stephen pointed out,[34] right up to the time of Coke there was no recognition at all in the degrees of the bodily violence inflicted, and the law was adjusted at every point to a state of things in which men used deadly weapons, and used them on very slight occasions. There is nothing in Staunforde, in Lambard nor in Coke drawing this distinction, and the examples given all turn on the details of fights with deadly weapons. Hale, however, began to draw the distinction, and he records a case [35] where a woman used very offensive language to a man sitting in an alehouse, whereupon he picked up a broomstaff and threw it at her. The broomstaff struck her on the head, thereby killing her. A special verdict was returned, and the question was propounded to all the judges in Sergeants Inn. Two points were involved, (1) whether bare words of this nature would amount to such a provocation as would reduce the killing to manslaughter, and (2), admitting there would not, in case there had been a striking with such an instrument as necessarily would have caused death as stabbing with a knife or pistolling, yet whether this striking was so improbable to cause death this will not alter the case. The judges were not unanimous on the point, but the King was recommended to pardon him which was accordingly done.

Speaking of the nature of the instrument used Hale observed, "If the master designeth an immoderate or unreasonable correction either in respect of the measure or manner or instrument thereof, and the servant dies thereof, I cannot see how this can be excused from murder if done with deliberation and design, nor from manslaughter if done hastily, passionately and without deliberation, and herein consideration must be had to the manner of the provocation, the danger of the instrument which the master useth, and the age or condition of the servant that is stricken, and the like of a schoolmaster against his scholar." [36]

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added that he did not realise the consequences of his act, but they cannot have meant that he began to do a harmless act or one but little blameworthy, which afterwards developed into something causing death. They must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences of his act. The only act in question was that which caused death, and the appellant who committed this act, if sane, must be held to have intended that consequence."

[34] H.C.L. III, 59.

[35] 1 Hale 456–7.

[36] 1 Hale 454.

It is scarcely arguable that the considerations relevant to this problem must essentially be judged by an objective test. Provided it is clear that, as Hale says, the actual beating is by design—that is, done deliberately and not accidentally—and it is difficult to see how a beating can be otherwise than by design, the question as to whether such beating is likely to cause great bodily harm or death must be an objective one; otherwise, in the application of violence to the person, every assailant would be able to fix his own standard as to what degree of violence should be applied. Hale also records the case at Norwich Assizes in 1670 where the master struck his young apprentice with a great staff, thereby killing him, as a result of which the master was convicted of murder.[37]

(*To be concluded*)

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[37] 1 Hale 474.

Practice and Procedure

Quarter Sessions

The imprisonment of offenders under twenty-one

After judgment was delivered in the case of *R.* v. *Tuppin and Taylor* in the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Havers JJ.: April 2, 1958), the Lord Chief Justice said that the court would like to emphasise the importance of quarter sessions giving their reasons when they sent young men under the age of twenty-one to prison. Quarter sessions were not to state their opinion but to give their reasons and to say why they were of opinion that the only way of dealing appropriately with the case was by imprisonment. The prevalence of a particular crime in the area was a perfectly satisfactory reason. [H. P.]

[NOTE: Courts of quarter sessions are required to state reasons in such cases by virtue of section 17 (3) of the Criminal Justice Act, 1948.]

Summary Justice

Aliens

Failing to report a change of address within 72 hours, contrary to regulations made under section 1 of the Aliens Act, 1914; fined £10, with the alternative of 31 days' imprisonment; Slavinski: Birmingham Magistrates' Court (*Birmingham Mail,* April 23).

Animals

Using two rabbits infected with myxomatosis to spread disease among uninfected rabbits, contrary to section 12 of the Pests Act, 1954; fined £5 5s. and ordered to pay £10 10s. costs; Smith: Hedingham Magistrates' Court (*Manchester Guardian,* April 23).

Dangerous drugs

Being in possession of 308 grains of Indian hemp, contrary to regulations made under section 3 of the Dangerous Drugs Act, 1951; 3 months' imprisonment; Moses: Birmingham Magistrates' Court (*Birmingham Mail,* April 15).

Disturbances

" Playing noisy instruments for the purpose of gathering alms " in Oxford Street on May Day, contrary to section 54 (14) of the

Metropolitan Police Act, 1839; four persons each fined 2s. 6d.: Marlborough Street Magistrates' Court (*Evening Standard*, May 2).

Gaming and Wagering

Allowing a room to be used for betting purposes contrary to the Betting Act, 1853; two persons fined £10 and £3 respectively; resorting to premises for the purposes of betting, contrary to the Suppression of Illegal Games Act, 1541; 27 persons each fined 6s. 8d.; Norridge and others: Oxford Magistrates' Court (*Manchester Guardian*, May 2).

Obstruction

Obstructing Catherine Street, Covent Garden, by standing therein. The defendant was stopping people and trying to sell them tickets at increased prices for *My Fair Lady*; fined £2: Bow Street Magistrates' Court (*The Times*, May 2).

Post Office

Making improper telephone calls in connection with the investigations into the death last January of Ann Noblett, contrary to section 66 of the Post Office Act, 1953; sentenced to a total of 10 months' imprisonment, 6 months to run consecutively, the other 4 months to run concurrently; Nunn: Luton Magistrates' Court (*The Times*, April 9).

Railways

Smoking in a non-smoking compartment of a train, contrary to by-laws made by the British Transport Commission under the British Transport Commission Act, 1950, s. 40; two persons each fined £1; Blunt: Haywards Heath Magistrates' Court (*Manchester Guardian*, April 29).

Trade

Applying a false trade description to blankets by describing them as "all wool" when, in fact, they were only 95 per cent. wool, contrary to section 2 (1) of the Merchandise Marks Act, 1887; fined £20; Fred Calverley, Ltd.: Huddersfield West Riding Magistrates' Court (*Manchester Guardian*, April 16).

Weights and measures

Using an unstamped measure, *i.e.*, an unmarked pint mug, for trade, contrary to section 29 of the Weights and Measures Act, 1878, and twice selling a below-weight measure of vinegar; fined £1 on each summons; Seyforth: Wallasey Magistrates' Court (*Liverpool Echo,* April 9).

Case and Comment *

By-law—*Interpretation—whether plural includes the singular*

JOHN *v.* HEATH [1] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: April 23, 1958) (*The Times,* April 24, 1958).

An information had been preferred against H charging her with having used a noisy instrument in a certain street, so as to cause " annoyance to the inhabitants " contrary to one of the by-laws for the borough in which the street was situated. D, an inhabitant of the borough, gave evidence before the justices to the effect that he had been woken by musical sounds which had come from an ice-cream van driven by H and that this had annoyed him. No other inhabitant gave evidence of having been annoyed. The justices were of the opinion that since the by-law referred to " inhabitants " in the plural, evidence of annoyance to one inhabitant was insufficient. They therefore found that there was no case to answer and dismissed the information. On appeal by the prosecutor by case stated,

Held, that it was wrong to interpret the by-law as requiring the evidence of two or more inhabitants: the plural included the singular.

Per curiam: If the noise was such that the maxim *res ipsa loquitur* applied, it would have been unnecessary to have called any witness to say that he had been annoyed. [D. C.]

COMMENTARY. The Interpretation Act, 1889, s. 1 (1) (*b*) provides that, in Acts of Parliament, words in the singular shall include the plural, and words in the plural shall include the singular. It was admitted by the Crown that the Act does not apply to by-laws. But it is, no doubt, convenient that by-laws should be governed by the same rules of construction as statutes.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the prosecutor: *Niall MacDermott* (instructed by Lathom & Co., Luton). For the respondent: *J. M. G. Griffith-Jones* (instructed by Simpson, North Harley & Co.).

Evidence — *Culpable homicide — medical examination for charge under Road Traffic Act,* 1930, *s.* 15

McKie *v.* H.M. Advocate [2] (High Court of Justiciary: Lord Justice-Clerk (Thomson) and two other judges of the court: February 21, 1958) (1958 S.L.T. (Notes of Recent Decisions) 29).

K had been involved in a motor accident. He was cautioned and charged with a breach of section 15 of the Road Traffic Act, 1930 (which relates to the driving of a motor-vehicle whilst under the influence of drink or drugs). He consented to undergo a medical examination. Subsequently, it was discovered that a man had been killed as the result of the accident. K was thereupon charged with culpable homicide. At his trial, objection was taken to the admissibility of evidence obtained as the result of the medical examination. The presiding judge admitted the evidence. K was convicted. He appealed against his conviction. It was contended on his behalf that although the evidence might have been admissible in a trial under section 15 of the Road Traffic Act, 1930, since that was the offence with which he was charged when he gave his consent to the examination, it was not admissible on a charge of culpable homicide, since that offence was only charged after he had given his consent.

Held, dismissing the appeal, that since K had been neither prejudiced nor treated unfairly as the result of the admission of the evidence, its admission was unobjectionable.

Per curiam: " A charge under section 15 is a very serious one. A man who is charged under section 15 after being involved in an accident is not likely just to brush it aside. . . . The matters which are to be examined on are precisely the same whether the charge is limited to section 15 or comprises culpable homicide. . . . The medical examination if it is to be of any use to either party—and it may be of great use to the accused—must take place at once." [D. C.]

Commentary. There is no doubt that the evidence would have been similarly admissible in English law, which is less strict than the Scots law regarding the admission of the results of medical examinations. See *R.* v. *Navell* [1948] 1 All E.R. 794 and *Taylor* v. *Irvine* [1958] Crim.L.R. 262.

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[2] For the appellant: *Stott Q.C.* and *Allan* (instructed by Allan McDougall & Co.). For the respondent: *Gillies, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Evidence—*Incest with five-year-old child—complaint made to grandmother*

R. *v.* WALLWORK[3] (Court of Criminal Appeal: Lord Goddard C.J., Donovan and Havers JJ.: April 2, 1958).

W. was convicted at assizes of incest with his daughter aged five. At the trial the daughter was called to give evidence but she could not remember anything and in fact did not give any evidence. The child's grandmother gave evidence, *inter alia,* of a complaint that the child had made naming W. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that the complaint had been wrongly admitted in evidence because the child had given no evidence which the complaint could corroborate and there was no question of consent or identity. Further the trial judge had failed to direct the jury that the complaint was no evidence of the facts complained of. Nevertheless on the particular facts of this case this court was convinced that no substantial miscarriage of justice had occurred and the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would therefore be applied.

Per Lord Goddard C.J.: (i) Under any circumstances it was most undesirable to call a little child of the age of five and it was hoped it would not occur again.

(ii) Although there were cases in which it was necessary to indicate a particular place in the indictment, for an offence of this description it was not necessary. [H. P.]

COMMENTARY. The terms of a complaint promptly made by the victim of a sexual offence may be admissible in evidence (a) to prove the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and (b) as being inconsistent with her consent to that of which she complains: *R.* v. *Lillyman* [1896] 2 Q.B. 167; *R.* v. *Osborne* [1905] 1 K.B. 551. It has always been held that the complaint is not evidence of the facts asserted in it. If, then, the complainant does not give evidence, the complaint is not admissible under (a), above; and, if consent is not in issue, it is not admissible under (b) or at all.

Evidence—*Scots law—admissibility of precognitions*

KERR *v.* H.M. ADVOCATE[4] (High Court of Justiciary: Lord Justice-Clerk (Thomson) and Lords Mackintosh and Blades: October 23, 1957) (1958 S.L.T. (Court of Session Reports) 82).

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[3] For the appellant: *Harold Brown Q.C., N. H. Curtis-Raleigh* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. L. Royle* (instructed by the Director of Public Prosecutions).

[4] For the appellants: *Cowie* (instructed by A. McE. Thomson for J. C. Cross, Airdrie). For the respondent: *Milligan Q.C.* (*Lord Advocate*) and *Law, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

After certain preliminary inquiries had been made by the police, three men were cautioned and charged with theft by housebreaking. On the following morning they appeared before the Sheriff-Substitute. They applied to be released on bail, but their application was refused. Later the same day, B., the employer of two of the accused, was called to the police station and there questioned by a police officer. The answers to the questions put to him were set down by the police officer in the form of a statement. The statement was subsequently passed to the prosecutor.

At the trial of the three men, the police officer who had questioned B. was called as a witness for the prosecution; B., however, was called for the defence. The police officer read out, in evidence, the statement which he had drawn up from the answers which B. had given to his questions. The statement differed materially from the evidence which B. subsequently gave. The three men were convicted. On appeal it was contended, on their behalf, that the statement, being in the nature of a precognition, had been improperly admitted in evidence.

Held, allowing the appeal, that at the time when the statement had been made the case against the accused had passed from mere investigation to preparation; that the statement was accordingly a precognition; and that it was therefore incompetent evidence.

Per curiam: " In the end of the day the question resolves itself in one of fairness. . . . Once the police have begun to build up a case against certain people who have been properly and expressly charged with some criminal offence, we have passed beyond the stage of preliminary investigation and have got into the stage of preparation for the leading of evidence and at that stage statements may well have a precognitional character and acquire that colour and slant which make it unsafe to regard them as a reliable reflection of what a witness said." [D. C.]

COMMENTARY. Precognitions are the written declarations of such persons as have knowledge of the facts and circumstances of the case, made at a preliminary inquiry. According to the *Encyclopaedia of the Laws of Scotland*, V, 191, " Opinions have differed as to the competency of contradicting a witness by what he has said in precognition, and the question cannot be said to be finally determined "; but " Practice has on the whole favoured Hume's view " that a precognition can never be used to discredit the witness's evidence.

Under English law, by the Criminal Procedure Act, 1865, ss. 4 and 5 (which do not apply to Scotland) a witness may be cross-examined as to previous statements (including depositions) made by him, inconsistent with his present testimony, and, if he does not admit that he made the statement in question, proof may be given that he did make it.

A precognition differs from a deposition in the important respects that it is taken in private, is not subject to cross-examination by the defence, and is taken, not by the magistrates, but by an official known as the Procurator Fiscal who is responsible (under Crown guidance) for the investigation and prosecution of crime. These factors, perhaps, have a tendency to make it a less reliable reflection of what a witness said than a deposition. Nevertheless it would seem that a statement similar to a precognition would be admissible in England under this the 1865 Act, but only to discredit the witness and not as evidence of the facts asserted in it. See *R.* v. *Hart* [1958] Crim.L.R. 133.

As to the dangers of evidence being falsified—even innocently—by police questioning, see Glanville Williams, *The Proof of Guilt* (2nd ed.), pp. 90 *et seq.*

Gaming — *Licensed premises* — *club registered under the Small Lotteries and Gaming Act,* 1956

POLICE *v.* SMITH AND OTHERS [5] (Birmingham Magistrates' Court, J. F. Milward, Esq., Stipendiary Magistrate, February 17, March 12, 1958).

S. was summonsed on two charges of allowing gaming to be carried on on licensed premises, contrary to section 141 (1) of the Licensing Act, 1953. The other defendants were officers of the bowling club which conducted the lottery, and they were charged with aiding and abetting, counselling and procuring the offences.

The facts were that the bowling club, duly registered under the Small Lotteries and Gaming Act, 1956, conducted a lottery, legal under that Act, in the assembly rooms of the public house of which S. was licensee. The lottery was decided by mechanically releasing numbered balls from a revolving canister, the prizes being allocated to holders of tickets whose numbers corresponded with those on the balls. Counsel for the defence submitted that the operation did not constitute unlawful gaming as it was, in fact, a legal lottery.

Held, that what took place was gaming. The matter was in no way affected by the Small Lotteries and Gaming Act, 1956. The defendants were fined £1 for each offence and the licensee was ordered to pay £1 9s. 10d. costs.

The magistrate agreed to state a case for the High Court.

[F. D. Howarth, *Solicitor, Clerk to the Justices.*]

COMMENTARY. The Small Lotteries and Gaming Act, 1956, s. 1, legalises certain lotteries conducted by societies which are established for (*inter alia*) " participation in or support of athletic sports or games or cultural activities," and which are registered, under the Act, with the local authority. Various conditions specified in the Act must be observed. The same Act, by section 4, also exempts small gaming parties at entertainments promoted otherwise than for private gain, subject to certain (different) conditions; but it is specifically provided that this section is not to affect the operation of section 141 of the Licensing Act, 1953.

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[5] For the prosecution: *M. P. Pugh.* For the defence: *A. P. Marshall, Q.C., Stephen Brown.*

Gaming is the playing of any game for money: *Dyson* v. *Mason* (1889) 22 Q.B.D. 351, *per* Huddleston B.; but there seems to be no judicial definition of " a game." The usual definition of a lottery is " a scheme for distributing prizes by lot or chance ": *Taylor* v. *Smetten* (1883) 11 Q.B.D. 207, 210, *per* Hawkins J., adopting the definition in *Webster's Dictionary*. The practice followed in the present case clearly fell within that definition. A lottery may, however, also be a game, for by the Gaming Act, 1738, s. 2, for example, certain games are declared to be lotteries. It would seem then, that a lottery which is also a game and which complies with the conditions of section 1 relating to lotteries is not legal unless it also complies with the provision of section 4 relating to gaming. If the procedure followed in this case was a game it is difficult to think of any lotteries which are not games. Was there any difference in principle between the facts of the case and drawing a number out of a hat; or the operation of " Ernie " in selecting the winners of premium bond prizes? Yet it is difficult to think of the holders of tickets in a draw or of premium bonds as participants in a " game." Ought not a game to require some activity on the part of the " players " other than the purchase of a ticket?

Is it not a proper conclusion from this case that a game which is also a lottery and which complies with section 4 will not be lawful unless it also complies with section 1?

Hire-Purchase — *Failure to comply with statutory regulations — absolute liability*

R. *v*. ST. MARGARET'S TRUST, LTD.[6] (Court of Criminal Appeal: Lord Goddard C.J., Donovan and Havers JJ.: April 21, 1958) (*The Times*, April 22, 1958).

The appellant company had been charged and convicted at the Central Criminal Court, with others, on an indictment containing seven counts relating to the disposal of motor-cars by hire-purchase without a deposit of at least 50 per cent. being paid, contrary to article 1 of the Control of Hiring Order, 1956 (S.I. No. 179). The appellant company were merchant bankers and provided the finance for the transactions which took place, in fact, between O., Ltd. (who were motor-car dealers and also one of the defendants), and the hire-purchaser. The case for the prosecution was that a deposit of less than 50 per cent. had been accepted by O., Ltd., and that the hire-purchase documents had been altered before submission to the appellant company so as to give the impression that the proper deposit had been paid. The case for the appellant company was that they had entered into these transactions on the basis of information supplied to them by O., Ltd., and, in the absence of *mens rea* on their part, they could not be convicted under article 1 of the Order. The company appealed to the Court of Criminal Appeal, by certificate of the trial judge, on the ground that the jury had been wrongly directed that there was an absolute liability under the Order and that, accordingly, it was no answer in law for the company to say that they had no knowledge as to the illegality of the transactions.

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[6] For the appellant: *Gerald Gardiner Q.C., J. C. Lawrence* (instructed by Dennison, Horne & Co.). For the Crown: *F. H. Lawton Q.C., Neville Faulks* (instructed by the Solicitor, Board of Trade).

Held, dismissing the appeal, that the appellant company had admittedly acted quite innocently throughout. But Kennedy L.J. had said in *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471 at p. 483, that modern statutes created offences where knowledge on the part of the offenders was not essential, and that accordingly, there was no universal prior presumption of *mens rea.* Each statute had to be construed according to its terms and its object. The words of the Order were in the present case an express and unqualified prohibition of the acts done by the appellant company. The object of the Order was to restrict the amount of credit given in hire-purchase transactions and to help defend the currency against the peril of inflation. Where Parliament enacted that a certain thing should not be done, it was not necessarily an excuse to say: "I carry on my business in such a way that I may do this thing unwittingly, and therefore should suffer no penalty if I transgress." This court thought that in the present case the importance of not doing what was prohibited was such that the method of business ought to be rearranged so as to give the necessary knowledge. The appeal would, therefore, be dismissed. [H. P.]

COMMENTARY. This decision affirms the ruling of Diplock J. reported at [1957] Crim.L.R. 810. See the commentary thereon.

Homicide—*Diminished responsibility—issue of insanity raised by prosecution*

R. *v.* BASTIAN [7] (Central Criminal Court: Donovan J.: January 29, 1958) ([1958] 1 W.L.R. 413).

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[7] For the Crown: *Christmas Humphreys* and *J. M. G. Griffith-Jones* (instructed by the Director of Public Prosecutions). For the accused: *F. H. Lawton Q.C.* and *Roger Frisby* (instructed by W. Timothy Donovan).

B. had been charged on indictment with the murder of his two sons. On arraignment he pleaded guilty, but the plea was subsequently withdrawn and a plea of not guilty entered. At the close of the case for the prosecution, counsel for the defence intimated that he intended to adduce evidence to prove that B. was suffering from diminished responsibility, within the meaning of section 2 of the Homicide Act, 1957, at the time when he killed his sons. Counsel for the prosecution contended that if the defence adduced such evidence he would be entitled to cross-examine to prove that the degree of abnormality was such as to amount to insanity, and to call evidence to that effect.

Held, that if the defence put the state of a man's mind in issue, to show that he had been suffering from such an abnormality of mind as produced diminished responsibility, the prosecution were under a duty, if they had evidence to support it, to cross-examine the witnesses for the defence to show that the accused was insane at the time when he committed the offence, and to call evidence to that effect.

Per curiam: "If [a man] raises this plea of diminished responsibility, it is for him to prove that he was suffering from such abnormality as is described in section 2 of the Homicide Act, 1957. He does not have to prove it with the same certainty that the prosecution have to prove guilt, the balance of probabilities will do, but he has to prove it. The onus is on him." [D. C.]

COMMENTARY. In *R.* v. *Smith* (1910) 6 Cr.App.R. 19 counsel asked the Court of Criminal Appeal for a direction as to the duty of counsel for the Crown with regard to tendering evidence of a prisoner's sanity. The Lord Chief Justice stated that at a meeting some seven or eight years earlier all the judges resolved that it was not proper for the Crown to call evidence of insanity but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him as he thought fit. So the court in *R.* v. *Casey* (1947) 32 Cr.App.R. 91 expressed disapproval of the procedure followed where the prison medical officer was put in the box by counsel for the Crown so that counsel for the defence could cross-examine him.

The ruling in the present case leads to the strange result that the Crown, in seeking to prove the prisoner to be insane, is contending for what is technically a verdict of acquittal: *Felstead* v. *R.* [1914] A.C. 534. Nevertheless the decision is a realistic one for a verdict of manslaughter on the ground of diminished responsibility will often be preferable, from the prisoner's point of view, to one of guilty but insane, when the result may be that the prisoner may be detained in Broadmoor for life. This latter result may well be in the public interest, and therefore, it is submitted, it is right that the Crown should be allowed to seek to achieve it.

Donovan J. is reported to have said, after the prisoner left the court, that it had occurred to him, after his summing up, that in such a case as this, it would be for the prosecution to satisfy the jury that the state of the accused's mind went beyond what the defence contended and amounted to insanity. This is logical as the M'Naughten Rules provide that every man is presumed to be sane until the contrary is proved. Is the burden of proof, in such a case, the heavy one of proof beyond reasonable doubt, or the lighter burden which lies on the accused when he seeks to prove insanity? On principle it is suggested it should be the former.

Homicide — *Diminished responsibility — medical evidence unchallenged*

R. *v.* MATHESON [8] (Court of Criminal Appeal: Lord Goddard C.J., Streatfeild, Slade, Donovan and Havers JJ.: March 24 and April 1, 1958) (*The Times*, March 25 and April 2, 1958).

M. was convicted at assizes of capital murder. The defence at the trial was, *inter alia*, that M. was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was accordingly not guilty of murder but of manslaughter. Three medical men were called by the defence and all were satisfied that M.'s mind was so abnormal as substantially to impair his mental responsibility and gave the reasons which led them to form their opinions. Cross-examination of these witnesses was directed only to the elucidation of some points in their evidence, but the opinions they had formed were not challenged nor was any evidence called in rebuttal. On appeal to the Court of Criminal Appeal:—

Held, that the medical evidence for the defence was clearly enough to shift the burden of proof thrown on the defence by the section. Whilst the decision as to whether an accused person was suffering from diminished responsibility was one for the jury and not for doctors, the verdict must be founded on evidence. Here there was unchallenged evidence of abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances that could displace or throw doubt on that evidence. Although this court recognised that the conduct of the accused before, at the time of and after the killing, might be relevant considerations for the jury in determining this issue, in the circumstances of this case this court was bound to hold that the verdict of murder was unsupported by the evidence and accordingly a verdict of manslaughter would be substituted.

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[8] For the appellant: *C. S. Waller Q.C., Peter Taylor* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *P. Stanley-Price Q.C., R. R. Rawden-Smith* (instructed by the Director of Public Prosecutions).

Per curiam: Where a defence of diminished responsibility is raised, a plea of guilty to manslaughter on this ground ought not to be accepted. Where another defence (*e.g.*, provocation) is raised which would reduce murder to manslaughter in addition to a defence of diminished responsibility, and the jury return a verdict of manslaughter, the judge should generally ask the jury on which ground their verdict is based or whether it is based on both grounds. [H. P.]

COMMENTARY. The case may be compared with that of *Rivett* (1950) 34 Cr.App.R. 87 where a verdict of guilty of murder was upheld, although all the medical evidence was to the effect that the accused was insane. In that case Lord Goddard said that the jury " had the opinion of medical men of undoubted integrity and whose qualifications none would question "; but " they had also the facts and the undisputed facts of all the surrounding circumstances." Apparently it was those surrounding circumstances which justified the jury, in the view of the court, in disagreeing with the medical evidence; and, apparently, there were no similar circumstances in the present case.

Indictment—*Debtors Act*, 1869—*obtaining credit by false pretences and by fraud other than false pretences*

R. *v.* HOLMES AND ANOTHER[9] (Leeds Assizes: Salmon J.: April 21–24).

Mr. and Mrs. H. were jointly indicted on an indictment containing twenty-five counts. They had been engaged in selling carpets and lino from a stall in Leeds Market. Mr. H. was bankrupt; Mrs. H. had been examined under section 25 of the Bankruptcy Act, 1914, in connection with that bankruptcy, the examination being on three separate days.

Counts 1–14 were all allegations of obtaining credit by false pretences or fraud other than a false pretence (Debtors Act, 1869, s. 13 (1)) from the wholesale suppliers of carpets, *i.e.*, of obtaining ever-increasing numbers of carpets and allowing the debts to mount up, the deficit being £12,000 out of £36,000. Counts 16–25 were all allegations of obtaining credit by fraud from individual members of the public, *i.e.*, by taking deposits on carpets as they were ordered, which were never delivered. About £150 was involved in these counts, which were framed under the Debtors Act following the decision in *R.* v. *Ingram* [1956] 2 Q.B. 424.

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[9] For the prosecution: *B. B. Gillis Q.C.*, *A. M. Hurwitz* (instructed by the Director of Public Prosecutions; for Mr. Holmes: *A. L. Myerson*, *L. H. Scott* (instructed by Leslie Gould, Leeds); for Mrs. Holmes: *G. F. P. Mason*, *G. Gray* (instructed by K. Stephens & Featherman, Leeds).

1. An application by counsel for both defendants to have the indictment severed was allowed by Salmon J. The learned judge was referred to *R.* v. *King* [1897] 1 Q.B. 214; *R.* v. *Hudson* (1952) 36 Cr.App.R. 94; *Castro* v. *R.* (1881) 6 A.C. 229; Indictment Rules, r. 3, and Indictment Act, 1915, s. 5 (3). It was submitted (a) that the two types of fraud alleged were quite different both in commission and in scope; and (b) that the evidence on the one set would be inadmissible to prove the other set, as tending only to be evidence of bad character. Salmon J. held that in the circumstances the accused would be prejudiced or embarrassed in their defence, and accordingly allowed Counts 16–25 to be severed.

2. Counsel for Mrs. Holmes then submitted that her answers in the section 25 examination were inadmissible against her. The shorthand transcripts were silent as to whether or not Mrs. Holmes had been cautioned before her examination began. Counsel referred to *R.* v. *Wheater* (1838) 2 Mood. 45, that where a person is cautioned the answers are admissible; to Taylor on *Evidence*, 12th ed., p. 568, and the maxim *nemo tenetur seipsum accusare*; to Williams on *Bankruptcy*, 17th ed., pp. 121 and 124; and to section 166 of the Bankruptcy Act, 1914.

Salmon J. held that the answers were admissible. He held that, in the absence of any authority, the lack of the caution on the face of the transcript did not matter, where no claim to privilege was made by Mrs. Holmes at the time, and where the answers were clearly voluntarily given. On the third day she was represented by a solicitor but no objection was taken either to the previous two days' answers or to answer questions on that day; *i.e.*, the third day's answers were given as voluntarily as on the first two days. He also held that section 166 of the Bankruptcy Act did not assist either way.

Semble, it is better that the shorthand note of such examination should include the caution as administered to the witness by the Registrar in Bankruptcy.

3. In the course of his summing-up Salmon J. expressed in strong terms the view "of all the judges at the assize" (Byrne, Davies, Elwes JJ. and himself) that the form of the indictment approved in the case of *R.* v. *Perry* (1945) 31 Cr.App.R. 16, although a decision of the Court of Criminal Appeal, ought not to be followed, *pace* the precedent in Archbold (p. 1348). No authorities were cited to the court in *Perry*.

In cases under the Debtors Act, 1869, s. 13 (1), it was undesirable to have the double allegation of false pretences and fraud other than a false pretence in one count; it was much better that separate alternative counts should be put in an indictment alleging, in the first count, obtaining credit by false pretences, and in the second, obtaining credit by fraud other than a false pretence, as in the view of the judges, it made it much easier for the jury to consider the matter.

[L. H. Scott, *Barrister-at-Law*.]

COMMENTARY. The Court of Criminal Appeal has pointed out on many occasions that it is undesirable that a large number of counts should be contained in one indictment. See *R.* v. *Hudson* (above).

Under rule 3 of the First Schedule of the Indictments Act, 1915, charges for any offence may be joined in the same indictment if those charges are founded on the same facts, on form, or are part of a series of offences of the same or a similar character. But under section 5 (3) the court may order a separate trial of any count when the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment. Whether he orders separate trials or not is a matter within the discretion of the trial judge, with which the Court of Criminal Appeal will not interfere unless compelled to do so by some overwhelming fact: *R.* v. *Hall* (1951) 35 Cr.App.R. 167. In that case Lynskey J. held that a number of counts could be tried together on the ground that all the witnesses to be called on all the counts could have been called on any one of the counts. This was not so, apparently, in the present case.

Section 25 of the Bankruptcy Act, 1914, empowers the court to summon (among others) the debtor or his wife and require them to produce any document or answer any question concerning the debtor, his dealings or property.

Section 166 of the Act provides (in effect) that answers so given in a compulsory examination shall not be admissible in any proceeding under sections 82, 83 and 84 of the Larceny Act, 1861. Section 43 (3) of the Larceny Act, 1916, affords a similar protection in respect of sections 6, 7 (1), 20, 21 and 22 of that Act. But there is no such provision regarding section 13 (1) of the Debtors Act, 1869.

A witness other than the bankrupt himself (see section 15 (8)) may refuse to answer on the ground that his answer would tend to criminate him. The court must, of course, be satisfied that the answer would have a tendency to expose the witness to a real and appreciable danger of a criminal charge, according to the ordinary operation of the criminal law. If a witness answers questions without claiming the privilege when he could have done so, then his answers are admissible against him.

In *R.* v. *Perry* it was held that an indictment under section 13 (1) of the Debtors Act, 1869, charging the accused with obtaining credit "by false pretences or by means of any other fraud" was to be regarded as charging one offence only and was not bad for duplicity.

Road Traffic—*Defective steering mechanism—Motor Vehicles (Construction and Use) Regulations,* 1955, *regs.* 73 (1) *and* 76.

BASON *v.* EAYRS [10] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: April 24, 1958).

On August 26, 1957, B. was charged with unlawfully driving on a road in Oakham a motor vehicle the parts and accessories of which, *viz.*, the steering mechanism, were in such a condition that danger was likely to be caused to a person on the vehicle or on a road contrary to regulation 73 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955. The vehicle, a jeep, was found unattended in a street in Oakham and B. admitted he had parked it there. In B.'s absence and without his knowledge it was examined by a Ministry of Transport vehicle examiner and it was found that there was one-third free play in the steering wheel due to excessive play in the steering joints and pivot of the steering arm due to wear. The examiner was of the opinion that it would be difficult to control a vehicle in that condition and that the jeep would constitute a danger when driven on the road.

The police contended that the steering mechanism was part of the vehicle and as, by reason of its defects, it would be difficult properly to control the jeep it was not maintained in such a condition that no danger was likely to be caused to a person on the vehicle or on the road and that accordingly B. was guilty of a contravention of regulation 73 (1). B. contended *inter alia* that the charge under regulation 73 (1) was misconceived as that regulation was intended to relate to the security of the parts and accessories rather than the state of their mechanical efficiency, and as regulation 76 expressly dealt with the maintenance in good and efficient working order and proper adjustment of steering gear it would be putting a false construction on regulation 73 (1) to extend it to cover such matters; and that if any offence had been committed at all, it was a contravention of regulation 76 and not regulation 73 (1). The justices were of the opinion that B.'s contentions were correct and dismissed the information.

On appeal by the prosecutor:

Held, allowing the appeal, that the justices had not come to a correct conclusion in point of law and the case must be returned to them with a direction to convict.

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

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[10] For the appellant: *W. P. Grieve* (instructed by Alfred Neale & Co.). The respondent did not appear and was not represented.

Road Traffic—*Hindering free passage along highway—passenger in vehicle*

BALDWIN *v.* PEARSON[11] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: April 25, 1958). (*The Times*, April 26, 1958).

P. was charged with having committed an offence under section 78 of the Highway Act, 1835. Section 78 provides that " . . . if any person shall . . . by negligence hinder . . . the free passage of any person . . . on any highway " he shall be guilty of an offence. It appeared that P. had been a passenger in a shooting brake and that she had opened the nearside door of the vehicle at such a time as to strike and injure a pedestrian who was walking on the pavement. The magistrates convicted her and fined her £3. She appealed to quarter sessions, and her appeal was allowed. It was contended on her behalf that since she had not been the driver of the vehicle she was not liable to be convicted under section 78 of the Highway Act, 1835. On appeal by the prosecutor by case stated:

Held, that it was immaterial whether or not P. had been the driver of the vehicle: she was a " person " within the meaning of the section, and was, accordingly, liable to be convicted. [D. C.]

COMMENTARY. This decision reverses *Police* v. *Pearson* [1957] Crim. L.R. 818. See the Commentary on that decision.

Road Traffic—*Medical examination.* See **Evidence**, p. 386, *ante.*

Road Traffic—*Notice of intention to prosecute—registered letter undelivered*

BEER *v.* DAVIES[12] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: April 28, 1958) (*The Times*, April 29, 1958).

D, the driver of an omnibus, had become involved in a road accident on June 10, 1957. The police decided to prosecute D. for careless driving; and on June 20 a notice of intended prosecution was sent by registered post to the address which D. had given to a police officer. D., however, did not receive the notice because he was away from home from June 15 to June 22; and the notice could not be delivered because there was no one at the address to take in registered post. The Post Office returned the notice to the police on June 27. On July 2 the police served, personally, a (second) notice on D. The metropolitan magistrate was of the opinion that no notice of intended prosecution had been served within the time laid down by statute—namely 14 days—and, accordingly, dismissed the information.

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[11] For the prosecutor: *A. B. Boyle Q.C.* and *S. E. Brodie* (instructed by W. H. Leatham, Bradford). For the respondent: *M. R. Hickman* (instructed by Crossman, Block & Co., for Eaton Smith & Downey, Huddersfield).

[12] For the prosecutor: *Paul Wrighton* (instructed by the Solicitor, Metropolitan Police). For the respondent: *Henry Newman* (instructed by Geoffrey B. Gush & Co.).

On appeal by the prosecutor by case stated:

Held, following *R.* v. *London Quarter Sessions Appeals Committee, ex parte Rossi* [1956] 1 Q.B. 682, that since the notice had never been delivered, it had never been served. [D. C.]

COMMENTARY. By section 21 of the Road Traffic Act, 1930, a person may not be convicted of several offences under that Act, including careless driving, unless he was warned at the time of the offence that he might be prosecuted, or either a summons or a notice of intended prosecution was served on or sent by registered post to him within fourteen days.

In previous cases it was held that it was immaterial whether the notice was *received* within fourteen days, provided that it was *sent* by registered post and properly addressed, so that, in the ordinary course, it might have been expected to reach the accused within that time: *Stanley* v. *Thomas* [1935] 2 K.B. 462. And where the defendant was seriously injured so that it would have been improper and unwise to serve the notice on him personally within fourteen days, it was held properly served when sent by registered post to his home address, notwithstanding that the police knew that he was lying in hospital at the time: *Sandland* v. *Neale* [1956] 1 Q.B. 241. " Whether or not the defendant received the notice within fourteen days is immaterial; the section requires the notice to be sent within that time; it says nothing about receipt, and for the obvious reason that the person to whom it is sent may be away from home when the letter is delivered," *per* Lord Goddard C.J.

In *Rossi's* case the Court of Appeal held that the Clerk of the Peace did not " in due course give notice," for the purposes of section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, where he sent a registered letter which was not received. An order made in Rossi's absence was therefore quashed.

It would seem that the Divisional Court has accepted *Rossi's* case as overruling the above decisions on the Road Traffic Act. This is rather surprising as (a) the words of the statutes are very different, the Summary Jurisdiction Act requiring that the clerk should " give notice " whereas the Road Traffic Act requires only that notice " be served on or sent by registered post to . . .": and, (b) the court in *Rossi's* case was influenced by the " fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them"—*per* Denning L.J. In the present case, and in the earlier cases under the Road Traffic Act, there was no question of the accused being found guilty in his absence. Moreover Morris L.J. pointed out that *Rossi's* case depended on the interpretation of the particular section of the particular Act and Parker L.J. referred to the cases under the Road Traffic Act without disapproval.

Trial—*Committal from magistrates' court—unsigned depositions*

R. *v.* EDGAR AND OTHERS [13] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.): April 21, 1958).

E., with others, was indicted at the Central Criminal Court on an indictment containing four counts. The defendants had been committed for trial from a magistrates' court where evidence had been taken and depositions made on three separate occasions. On one of these occasions the magistrate had not signed the depositions then made. On a motion to quash the indictment the trial judge had quashed two counts and held that the evidence contained in the signed depositions justified a committal on the remaining counts. The appellants were convicted on those counts and appealed to the Court of Criminal Appeal on the ground that in the circumstances the whole committal was bad in law.

Held, dismissing the appeal, that the evidence contained in the signed depositions had justified committal for trial. In the opinion of this court the fact that certain other depositions were taken which were not signed by the magistrate did not render the whole committal bad. The convictions were accordingly upheld. [H. P.]

COMMENTARY. The Criminal Justice Act, 1925, s. 12 (7), requires that the deposition taken in connection with any charge for an indictable offence shall be signed by at least one of the justices before whom they are taken.

Trial—*Plea of "guilty, with explanation"—appeal out of time*

R. *v.* KUENDZI [14] (Leeds City Quarter Sessions, H. C. Scott, Esq., Assistant Recorder: March 31 and April 1, 1958).

On February 17, 1958, K., a native of Ghana, appeared before the Leeds Stipendiary Magistrate charged with stealing a purse.

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[13] For the appellant: *Miss P. G. Coles* (instructed by the Registrar, Court of Criminal Appeal). For the other appellants: *J. B. Worsley* and *J. W. Harkess* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. B. R. Hazan* (instructed by The Solicitor, Metropolitan Police).

[14] For the prosecution: *L. H. Scott* (instructed by Town Clerk, Leeds). For the defence: *H. C. Beaumont* (instructed by the court, legal aid).

He pleaded "guilty—with explanation" which was entered as a plea of guilty. In mitigation he said in effect that he found the purse and intended ultimately to return it. He was then committed to Quarter Sessions for sentence. The Assistant Recorder on learning of what K. had said, considered that in the circumstances of the case it amounted in effect to a plea of "not guilty." Having no power on a committal to remit the case to the Stipendiary Magistrate (the committal itself not being invalid) he heard evidence as to what had been said in the court below and found as a fact that an unequivocal plea of guilty had been made, but under a mistake. He therefore, following *R.* v. *Durham Q. S., ex parte Virgo* [1952] 2 Q.B. 1 and not following *R.* v. *Emery* (1943) 29 Cr.App.R. 47 gave leave out of time to appeal against conviction. (The appeal was then heard with the evidence and was dismissed. K. was thereupon sentenced under the original committal.)

[L. H. Scott, *Barrister-at-Law*.]

COMMENTARY. In *R.* v. *Durham Q. S., ex parte Virgo* the accused entered a plea which, it was held, taken as a whole, amounted to a plea of not guilty, but a plea of guilty was wrongly recorded. It was held by the Divisional Court that the court of quarter sessions were entitled to treat the trial as a nullity and had rightly exercised their power under section 31 (1) (vii) the Summary Jurisdiction Act, 1879, of sending back the case to petty sessions with an expression of their opinion. Though the facts in the present case seem to be similar in all material respects, the committal was treated as valid. If, as was said in the *Durham* case, the proceedings before the magistrates were a nullity, how could an appeal against conviction be dismissed, and how could a sentence on the original committal be valid?

In *R.* v. *Emery* an accused who pleaded "guilty in self-defence" was committed to quarter sessions for sentence, and sentenced, under section 10 of the Criminal Justice Administration Act, 1914. The Court of Criminal Appeal quashed the conviction on the grounds (a) "that the appellant was never properly before the court of quarter sessions, in that there was never a conviction by the court of summary jurisdiction" and (b) that the Recorder omitted to inquire into the circumstances of the case as statute required. Ground (a) seems to apply equally in the present case. *Emery* appears to be in no way inconsistent with the *Durham* case.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* O'MALLEY, the court (Cassels, Slade and Havers JJ.: March 3, 1958) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. O. had pleaded guilty at a magistrates' court to two offences of larceny as a servant and had been committed to a Crown court for sentence. O., who was a man of thirty-two years of age, had previous convictions as follows: Borstal training in 1942 for larceny as a servant; twelve months' imprisonment in 1946 for larceny (four cases); and three and six months' imprisonment consecutive in 1956 for larceny as a servant (three cases of obtaining credit by fraud being taken into consideration). The present offences were committed when O., who was employed as a salesman, stole money which he had been given to hand over to a fellow employee. O. was an alcoholic. The court stated that what must have seriously and adversely affected the Crown Court's consideration of this case was the fact that O. was an alcoholic, but this court could in the circumstances reduce the sentence to one of eighteen months' imprisonment.

In R. *v.* WILLS, the court (Lord Goddard C.J., Donovan and Havers JJ.: April 2, 1958) reduced a sentence of four years' imprisonment to one of twelve months' imprisonment. W. had been convicted by quarter sessions of receiving (but acquitted of stealing) a number of small articles, worth under £1 in all, and £6 10s. in money. W., who was twenty-seven years of age, had the following previous convictions: six offences, mostly for breaking offences, as a juvenile when he was dealt with by way of fine, bind over and approved school; bind over in 1949 for attempted false pretences; Borstal training in 1950 for shopbreaking and larceny (nine other offences taken into consideration); twelve months' imprisonment in 1954 and fifteen months' imprisonment in 1956 for similar offences. The court stated that the sentence of four years' imprisonment might have been justified had W. been convicted of stealing the articles and money; but for receiving these trumpery articles it was too severe. It was not right to say, as had quarter sessions, that because W. had refused to disclose the identity of the thief that that was a ground for increasing the sentence. Accordingly the sentence would be reduced to twelve months' imprisonment.

Preventive detention

In R. *v.* LAUNDY-WILSON, the court (Lord Goddard C.J., Donovan and Paull JJ.: March 24, 1958) reduced a sentence of eight years' preventive detention to one of three years' imprisonment. L. had been sentenced by quarter sessions for the larceny of a motor-car. L., who was a man of thirty-three years of age, had been repeatedly convicted since he was twenty-two years of age, in most cases for offences relating to stealing, or taking and driving away motor-cars. In many cases after conviction L. had been to sea and had behaved well. The court stated that generally a man with this record would be given preventive detention, but this was not an ordinary case. L. could earn an honest living and was a good seaman. In the circumstances the court would substitute a sentence of three years' imprisonment.

In R. *v.* GRIMWOOD, the court (Lord Goddard C.J., Streatfeild and Paull JJ.: March 19, 1958) reduced a sentence of eight years' preventive detention to one of two years' imprisonment. C. had pleaded guilty at a magistrates' court to larceny of 14s. from a gas meter in his house. He had been committed to quarter sessions for sentence where four other offences (two of larceny, one of obtaining goods by false pretences and one of obtaining credit by fraud; the total value of the property involved being about £15) were taken into consideration. G., who was a man of thirty-one years of age, had six previous convictions, as follows: approved school in 1940 as being beyond parental control; nine months' imprisonment in 1947 for two offences of obtaining money by a forged instrument; twelve months' imprisonment in 1949 for housebreaking (seven other offences taken into consideration); one month's imprisonment in 1953 for larceny; twelve months' imprisonment in 1954 for housebreaking (five other offences taken into consideration); and three years' corrective training in 1955 for housebreaking (five other offences taken into consideration). G. had been last released from prison in April, 1957, and had worked well until about October, 1957. The court stated that in their opinion a sentence, particularly one of preventive detention, ought really to have relation to the gravity of the crime itself. G. had not lapsed back into his old habits of housebreaking though he was certainly indulging in petty pilfering. The sentence of preventive detention was very nearly merited, but having regard to the comparative triviality of the offences, this court would substitute a sentence of two years' imprisonment.

Corrective training

In R. *v*. FALL, the court (Lord Goddard C.J., Streatfeild and Paull JJ.: March 19, 1958) upheld a sentence of two years' corrective training. F. had pleaded guilty at a magistrates' court to two offences of larceny and had been committed for sentence to quarter sessions where two other offences of larceny were taken into consideration. F., who was a man of twenty-five years of age, had three previous convictions, as follows: six months' detention in 1952 (by court-martial) for stealing a bottle of rum; nine months' imprisonment in 1955 for housebreaking and other offences; and twelve months' imprisonment in 1956 for stealing lead fixtures. The present offences were committed when F. stole a salesman's sample case, value about £8, from a van and also a tin of beef-steak from a house. The two other offences taken into consideration were larceny of 30s. in money and attempted larceny from an offertory box in a church. The court stated that they had frequently said that they did not approve of sentences of two years' corrective training except in exceptional circumstances.[1] As a general rule three years was the minimum sentence. But in the present case corrective training was the one thing that might steady this man up and lead him away from crime; on the other hand, it was not quite a case for a three years' sentence. The sentence would accordingly be upheld.

In R. *v*. HILL, the court (Lord Goddard C.J., Donovan and Paull JJ.: March 24, 1958) reduced a sentence of three years' corrective training to one of twelve months' imprisonment. H. had pleaded guilty at assizes to bigamy. H., who was a man of twenty-six years of age, had previous convictions, including a conviction for twenty-one cases of fraudulent conversion for which he was fined in 1953. H. had had two years' service in the Parachute Regiment and had been discharged with a very good character. The present offence was committed when H., on being told by the young woman with whom he was associating that she was pregnant, went through a ceremony of marriage with her. It turned out that the young woman was not in fact pregnant. The court stated that, whilst not minimising the seriousness of the offence of bigamy, the sentence of corrective training was an inappropriate sentence. Accordingly a sentence of twelve months' imprisonment would be substituted.

In R. *v*. WALKER, the court (Lord Goddard C.J., Donovan and Havers JJ.: April 2, 1958) substituted a sentence of three years' imprisonment for one of three years' corrective training. W. had pleaded guilty at quarter sessions to garage-breaking and stealing

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[1] See, *e.g.*, *R.* v. *Grant*, 34 Cr.App.R. 230, 235.

(one further case being taken into consideration). W., who was a man of twenty-four years of age, had three findings of guilty and six convictions recorded against him. The prison commissioners had recommended corrective training. W., in his notice of appeal to the Court of Criminal Appeal, stated that he would not benefit by corrective training because (i) he would get no training and (ii) he would be associating with persons with whom he did not wish to associate. The court stated that the fact that a prisoner pleaded for some different sentence than corrective training was not by itself a reason why it should be granted. It might be that the very fact that he did not like it indicated that it was the best thing for him. But the terms of W.'s plea, which he had repeated before the court today, made it plain that he was determined not to benefit by the sentence of corrective training. In these circumstances the sentence would be altered to one of three years' imprisonment with an order under section 22 of the Criminal Justices Act, 1948.

Borstal training

In R. *v.* GOMEZ, the court (Lord Goddard C.J., Donovan and Havers JJ.: April 2, 1958) varied a sentence of Borstal training to one of two years' imprisonment. G. had been convicted at quarter sessions of burglary. G., who was a young man of nineteen years of age, had a number of previous convictions including malicious wounding in 1956 and driving a motor-vehicle whilst uninsured in 1957. In October, 1957, he had been put on probation for attempting to break into a sub-Post Office, and a fortnight later, having broken open his father's garage and taken his father's van, he committed the present offence by burgling a Post Office with another young man and stealing £1,100 worth of property of which £600 worth was not recovered. Whilst on bail for this offence, G. had taken and driven away another car without permission. The court stated that prison was the only appropriate punishment for this class of case. The prison commissioners had not recommended G. for Borstal and had said it was doubtful whether Borstal would have any effect. A sentence of two years' imprisonment would, therefore, be substituted for the sentence of Borstal training.

Binding over

In R. *v.* NOWELL, the court (Cassels, Slade and Havers JJ.: March 3, 1958) varied a sentence of Borstal training to a bind over for three years. N. had pleaded guilty at a magistrates' court to stealing a motor-cycle with another man, to aiding and abetting the use of the motor-cycle without insurance and to obtaining £10 on a forged Post Office Savings Bank book, and was sent to quarter sessions for sentence where another offence of obtaining money on the forged book was taken into consideration. N., who was a man of nineteen years of age, had a good record until September, 1957, when he was fined for two offences in connection with the forcing of a telephone kiosk. At the time of the present offences N. was serving on a twelve year engagement with the Royal Air Force, where his conduct had been good and he was said to be an excellent and reliable airman. His officer said in court that the Royal Air Force was willing to have him back. The court stated that these were serious offences and this court could well understand the sentence passed by quarter sessions. But in the particular circumstances of this case it was just possible to vary the sentence to a bind over for three years.

Acts and Orders *

Agriculture

GRASS AND CLOVER SEEDS GENERAL LICENCE, 1958 ; (SCOTLAND), 1958 (S.I. Nos. 575, 648) ; operative April 8, 1958, and April 15, 1958, respectively. The Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland extend, for two periods in the year 1958, the time during which particulars of germination of certain grass and clover seeds may be given to a purchaser by a seller of those seeds. The requirement of the Seeds Act, 1920, as amended by the Agriculture (Miscellaneous Provisions) Act, 1954, that such particulars must be given not later than seven days after the sale or delivery of the seeds, whichever is the later, is extended to thirty-five days after sale in the case of grass seeds and mixtures of grass and clover seeds, and to twenty-one days after sale in the case of clover seeds. These extensions only take effect from the operative dates of the licences until May 15, 1958, inclusive and from August 1, 1958, to October 15, 1958, inclusive. The time for delivery of particulars other than those of germination remains unaffected by this licence.

Animals

IMPORTED LIVESTOCK (MARKING) (REVOCATION) ORDER, 1958 (S.I. No. 616) ; operative April 14, 1958. The Order of 1954 (S.I. 1954, No. 760), as amended (by S.I. 1955, No. 1223), is revoked and replaced by a new Order (see below).

IMPORTED LIVESTOCK ORDER, 1958 (S.I. No. 558) ; operative

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* Prepared by F. Maurice Drake, Barrister-at-Law.

April 14, 1958. The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, as amended (S.R. & O., 1945, No. 942, as amended by S.R. & O., 1946, No. 1108), are revoked and replaced, and the provisions of the Imported Livestock (Marking) Order, as amended (see above), are incorporated. The principal changes are: (a) the control provisions relate to livestock entering the United Kingdom from the Channel Islands as well as from the Isle of Man and the Republic of Ireland; (b) " livestock " is defined to include the carcasses of pigs in Northern Ireland; (c) vehicles and containers used for the handling, carriage or concealment of livestock imported, removed or brought into the United Kingdom in contravention of the Order are liable to forfeiture; (d) provision is made for the marking of livestock entering the United Kingdom from any place of origin; and (e) minor changes are made in the procedure for giving notice of seizure, for claims relating to things seized, and for the institution of proceedings for the condemnation, as forfeited, of things seized.

For penalties for contraventions, see section 7 of the Agriculture Act, 1957 (5 & 6 Eliz. 2, c. 57; [1957] Crim.L.R. 690).

Armed Forces

CERTIFICATES OF ARREST AND SURRENDER OF DESERTERS AND ABSENTEES (NAVY) REGULATIONS, 1958 (S.I. No. 561); operative on such date as may be appointed for the coming into force of the Naval Discipline Act, 1957 (5 & 6 Eliz. 2, c. 53; [1957] Crim.L.R. 691). The form of certificate to be handed over when a naval absentee or deserter, who has surrendered himself to the police, is delivered into naval custody is prescribed. The Regulations also prescribe the form of certificate to be handed over when an absentee or deserter is delivered into naval custody as a result of proceedings before a court of summary jurisdiction, and they fix the fee payable to the clerk of the court in respect of such a certificate.

NAVAL DISCIPLINARY COURTS (PROCEDURE) ORDERS, 1958 (S.I. No. 562); operative on such date as may be appointed for the coming into force of the Naval Discipline Act, 1957. General Orders made under section 57A (4) of the Naval Discipline Act, 1866, are superseded. The jurisdiction of disciplinary courts is limited to offences committed in time of war by officers below the rank of Commander which appear to the convening authority not to be of such a nature as to necessitate trial by court-martial. A disciplinary court may consist of fewer officers than a court-martial and the range of offences which it can try is more limited. Subject to these differences, the Orders apply the new court-martial procedure to disciplinary courts as far as possible.

Criminal Procedure

CRIMINAL APPEAL RULES, 1958 (S.I. No. 652); operative May 1, 1958. Paragraph (*d*) of Rule 5 of the Criminal Appeal Rules, 1908 (S.R. & O., 1908, No. 227), is amended so as to enable a shorthand writer appointed under the Criminal Appeal Act, 1907, to furnish a transcript to a person other than a party interested in the trial or proceeding, provided that leave is obtained from a judge of the Court of Criminal Appeal.

Emergency Laws

COAL DISTRIBUTION (AMENDMENT) ORDER, 1958 (S.I. No. 508); operative April 1, 1958. The principal Order (S.I. 1943, No. 1138) is amended so that the occupier of controlled premises may now change his licensed merchant without giving reasons if he applies to the Local Fuel Overseer between April 1 and August 31, 1958.

London Traffic

PARKING PLACES (WESTMINSTER) (No. 1) ORDER, 1958 (S.I. No. 549); operative July 10, 1958, save for Article 26 (which enables the Westminster City Council to acquire and instal parking meters before that date), which is operative April 3, 1958. Under the provisions of the Road Traffic Act, 1956, parking places are designated on certain highways in the City of Westminster at which charges may be made by the Council for vehicles authorised by the Order to be left there. The location of these parking places is set out in the Schedule to the Order. Article 2 sets out the permitted hours during which certain vehicles may be left in these parking places, and the permitted vehicles are specified in Article 7. The charges for leaving the vehicles for certain periods and the periods for which vehicles may be left at any one time are set out in Articles 8, 9 and 10. Provision is made for parking meters to be installed (Article 12) and for payment of the initial charge to be made by the insertion of coins in these meters (Article 8). Excess charges for longer waiting are to be paid direct to the Council (Article 11). Parking attendants are to attach notices to vehicles indicating that an excess charge has been incurred (Article 9) or that the vehicle has been left in the parking place beyond the permitted period of time (Article 10 (2)). Further provisions deal with the manner in which vehicles are to stand in the parking places (Article 15); the removal of vehicles from the parking places in certain circumstances (Article 17); the suspension of the use of the parking places (Articles 20 and 21); permitting vehicles to wait free of charge in the parking places for certain specified purposes, *e.g.*, to enable persons to board or alight from the vehicles (Article 23), and for other matters arising out of the Order. The London Traffic (Parking Places) Consolidation Regulations, 1957 (S.I. 1957, No. 1937) are amended in consequence of this Order, by deleting items numbered 22, 30 and 42 from the 2nd Schedule thereto.

For penalties for contraventions, see section 22 of the Road Traffic Act, 1956.

LONDON (WAITING AND LOADING) (RESTRICTION) REGULATIONS, 1958 (S.I. No. 660); operative June 1, 1958. The nineteen Regulations listed in the 15th Schedule are consolidated with amendments. The principal changes are: (1) the restrictions will now apply in a considerable number of additional streets in the City of London, Metropolitan Boroughs and other districts within the London Traffic Area; (2) in most streets where the present restrictions apply from Mondays to Fridays they will now apply from Mondays to Saturdays inclusive; (3) in most streets where the present restrictions apply between 11.30 a.m. and 6.30 p.m. they will now apply between 8.30 a.m. and 6.30 p.m. or later; and (4) the earlier provision limiting to twenty minutes the waiting of vehicles for the purpose of loading or unloading goods will now in most cases not apply before 11 a.m. or after 6.30 p.m.

For penalties for contraventions, see Regulation 15 of these Regulations.

LONDON TRAFFIC (MISCELLANEOUS PROHIBITIONS AND RESTRICTIONS) REGULATIONS, 1958 (S.I. No. 659); operative June 1, 1958. Various previous Regulations (S.R. & O., 1937, No. 1; S.R. & O., 1938, No. 907; S.R. & O., 1947, No. 1712) are consolidated with amendments. The principal changes are that certain provisions in the earlier Regulations relating to the lighting and guarding of street works, to traffic notices and to the reversing and turning of vehicles have been omitted.

For penalties for contraventions, see Regulations 6, 9, 12, 14 and 18 of these regulations.

The following Order has been made regulating traffic: S.I. No. 548 (Leatherhead).

The following Order has been made prohibiting waiting: S.I. No. 547 (St. Albans).

Merchant Shipping

MERCHANT SHIPPING (LIFE-SAVING APPLIANCES) RULES, 1958 (S.I. No. 602); operative May 1, 1958. The Rules of 1952 (S.I. 1952, No. 1949, as amended by S.I. 1956, No. 645) are revoked and consolidated with amendments. The principal changes are: (1) new scales of life-saving appliances are introduced for ships of certain classes. These scales require inflatable life rafts to be carried by certain classes, and permit their carriage by ships of another class in lieu of a boat, and make a number of other modifications in the requirements for life-saving appliances on these ships; (2) new scales of life-saving appliances are introduced for fishing boats of 145 feet or over in length and new alternative scales for other fishing boats not under 70 feet in length. These scales require the provision of inflatable life rafts in all such ships and permit the carriage of a boat known as a Class C boat in lieu of a lifeboat; (3) requirements are laid down for the construction and equipment of Class C boats; (4) specifications are introduced for the hand-held distress flare signals included in the equipment of lifeboats, boats and inflatable life rafts and for the buoyant smoke signals included in the equipment of lifeboats and boats; (5) provision is made for certain lifeboats and Class C boats carried in fishing boats to be attached to mechanically controlled single-arm davits. Requirements for the construction and testing of these davits are specified; (6) alterations and additions are made to the equipment required to be carried in inflatable life rafts.

For penalties for contraventions, see section 430 of the Merchant Shipping Act, 1894.

Revenue

EXCHANGE CONTROL (AUTHORISED DEALERS) (AMENDMENT) ORDER, 1958; (AUTHORISED DEPOSITARIES) (AMENDMENT) ORDER, 1958 (S.I. Nos. 533 and 534); both operative April 1, 1958. The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited under the provisions of the Exchange Control Act, 1947, are amended.

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

45. *Statutory powers of arrest without warrant*

The recent articles by Dr. Glanville Williams on the above subject prompt me to ask your opinions on the following queries which have puzzled me for some time and for which I have been unable to find any authoritative solutions.

The Prevention of Offences Act, 1851, section 11, states, "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night." Where, under section 25, Magistrates' Courts Act, 1952, a person is entitled to claim trial by jury, the offence being one (other than an assault or an offence under section 30, 31 or 32 of the Sexual Offences Act, 1956) which renders such person liable to a sentence of more than three months' imprisonment and, bearing in mind that an offence which by or under statute is punishable on summary conviction or on conviction on indictment, being an offence which *can* be dealt with on indictment is an indictable offence (*Hastings and Folkestone Glassworks* v. *Kalson* (1949)) (Arch. para. 14), do you consider that section 11, Prevention of Offences Act, 1851, may be read as, "It shall be lawful for any person whatsoever to apprehend any person who shall be found by night committing any offence punishable by more than three months' imprisonment."?

Has the word "indictable" ever been defined so as to exclude this interpretation?

My second query relates to section 66 of the Metropolitan Police Act, 1839 which states, "Any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction, by virtue of this Act, may be taken into custody without warrant by any constable . . ." This section clearly gives the constable the power to arrest any person found committing any offence against the Act (Arch. para. 1907). Why then was it considered necessary for section 54 of the Act to carry its own identical power of arrest and how can section 63 of the Act be explained as this section gives a constable the power to arrest any person committing any offence against the Act only if his name and address shall be unknown and cannot be ascertained?

Page 144 of *Criminal Law and Procedure in a Nutshell* (9th edition), states that, in London, a constable may arrest without warrant any person reasonably suspected of committing or being about to commit any indictable crime. Which statute did the writer have in mind for this very wide power of arrest?

Lastly, do you consider that the common law power of arrest for misdemeanours accompanied by a breach of the peace would justify an arrest for an indecent assault on an adult? [F. C.]

ANSWER

1. Since an offence of the class mentioned cannot be tried on indictment unless the accused consents, it would seem that such is not aptly described as an "indictable offence" so as to be within

section 11, Prevention of Offences Act, 1851. This view is supported by *Hastings, etc.* v. *Kalson* [1949] 1 K.B. 214, and especially by the judgment of Asquith L.J. The point of this case seems to be that it is not the procedure by which the offence is ultimately tried which decides whether the offence was an indictable one or not; it is the nature and quality of the offence itself which matters. If it is of such a character that the authorities may choose to bring it home to the offender by indicting him in respect of it, it is aptly described as indictable, but if the law regards the offence as so trivial that no one can insist upon its being tried by jury except the offender himself then the offence can only be described as a summary one. It is reasonable to assume that the power to arrest given by section 11 is confined to serious rather than trivial offences.

2. The only explanation (if it is an explanation) of the overlapping and alternative powers of arrest given by various sections of the Metropolitan Police Act, 1839, is that the draftsmen of early Victorian statutes were given to this sort of needless repetition.

3. An indecent assault is not necessarily accompanied by a breach of the peace. Only if it is will the common law power of arrest for misdemeanour accompanied by a breach of the peace be relevant. [D. W. E.]

Letter to the Editor

Bills of lading as evidence in criminal cases

Sir,

I was interested to read your ingenious suggestion at p. 328 of your May number that the provision of the Carriage of Goods by Sea Act, 1924, should in effect make bills of lading evidence of the receipt by the carrier of the goods covered by it in a criminal case. Article III, rule 4, of the Schedule, read by itself indeed appears to have just this effect, but is not the answer surely that this is not a statutory provision of substantive law but rather, to paraphrase the words of Viscount Sumner in *Gosse Millard* v. *Canadian Merchant Marine* ([1925] A.C. 223, 236) part of a legislative bargain to replace a conventional contract? By section 1 of the Act the rules in the Schedule are to apply only in relation to the carriage of goods by sea from ports of the United Kingdom. This alone would appear to make them inapplicable to a case such as *R.* v. *Gordon and Spencer* where cotton was imported into England. But further I would respectfully submit they can have no application to the criminal law at all in any circumstances. Article II appears to govern the articles subsequent to it, and that makes the rules applicable to contracts of carriage. The effect then of Article III, rule 4, is that under a contract of carriage, *viz.*, the relevant bill of lading, that bill of lading is itself prima facie evidence as between the parties to the contract of carriage of the receipt by the carrier of the goods therein described, but that it is not by itself evidence as against a stranger to the contract of carriage.

Yours, etc.,
R. P. COLINVAUX
(*Barrister-at-law*).

Essex Court, Temple.

Books and Periodicals

Reviews:

The Sanctity of Human Life and the Criminal Law. By Glanville Williams, Fellow of Jesus College, Cambridge. London: Faber and Faber, Ltd. 1958. 312 pp. and 7 pp. (index and table of cases). (30s. net.)

Of the many notable contributions by Dr. Williams to English legal literature none can surely surpass the present volume in its provocative and stimulating contents. Based on the Carpentier Lectures delivered by the author at Columbia University in the early part of 1956—the present volume is an expanded version of the original American edition—the English reader is presented with a scholarly, objective but nonetheless impassioned examination of the many controversial problems arising out of the general question of how far English criminal law should be invoked for the purpose of protecting human life, whether actual or potential.

Among these topics, all of them of great moral and social importance, is the almost unique position adopted by English law towards attempted suicide, a subject very much in the front of public discussion at the moment. Dr. Williams's contributions on the subject to *The Times* are probably familiar enough but in this book the reader is afforded the opportunity of studying in detail the learned author's convincing case urging the withdrawal from the criminal calendar of this, nowadays, rarely invoked misdemeanour. Historically, as Dr. Williams shows, the motives underlying the genesis of attempted suicide as a crime were highly dubious, its creation having little apparent nexus with the ethics governing the prohibition of suicide. Several facts are pointed to as illustrating the considerable change in practice which has been effected since the end of the First World War, and reference is usefully made to the studies which have been carried out, both in this country and elsewhere, into the causes prompting attempted suicides. Permeating the whole of Dr. Williams's treatment is the incontrovertible assertion that the punishment of attempted suicide is both cruel and inefficacious, legal sanctions having completely failed to stop the incidence of such behaviour. The Home Secretary recently stated in the House of Commons that the Government was unwilling to abolish the law which punishes attempted suicide, because there was no evidence that a change would be "universally acceptable to public opinion." Allowing for a reasonable, rather than a literal, interpretation of the Home Secretary's criterion for legislative reform, hitherto informed public opinion may have answered, with some justification, that it has not been given an opportunity of studying the facts, or the moral, legal and social arguments involved. To the extent that Dr. Williams's thorough analysis remedies such a void it may well prove instrumental in converting the cautiously minded into supporters of the kind of legislative proposals outlined in 1947 by the Council of the British Medical Association.

The related question whether a physician who accelerates the release of death from helpless pain is entitled to moral and legal absolution for his act, recently the subject of Devlin J.'s direction to the jury in *R.* v. *Adams* (1957), finds Dr. Williams espousing the cause of legalising voluntary euthanasia in defined circumstances. The present reviewer may be pardoned for suggesting that the learned author's case for legislative reform in this field is less convincing than in the field of attempted suicide. Never content with a mere discussion of the general issues involved Dr. Williams puts before the reader his own proposals, which are seen to diverge markedly from the provisions of the Bill sponsored by the Euthanasia Society in 1936, and debated in the House of Lords, seeking to legalise voluntary euthanasia under elaborate administrative safeguards. Some of these safeguards, as for example the instituting of an official euthanasia referee by the Minister of Health, and the administration of euthanasia in the presence of an official witness who could be a doctor, justice of the peace, barrister or solicitor, struck the present reviewer as being grotesque. In their place the author borrows the principle embodied in the Infant Life (Preservation) Act, 1929, and advocates an equally simple Bill providing that no medical practitioner should be guilty of an offence in respect of an act done intentionally to accelerate the death of a patient who is seriously ill. To this provision, however, there would be an important limitation, namely, that criminal liability would attach if it were proved that the act was not done in good faith with the consent of the patient and for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character. The present reviewer would make but three observations on Dr. Williams's case advocating this change in the law. First, it is at least doubtful whether the wording of any such Bill can have the effect, as he maintains, of changing the moral question involved. Outwardly, it may well be that attention will be directed to the question whether the doctor should be punished, but surely that does not relegate to unimportant obscurity the fundamental question whether euthanasia is right or wrong. Secondly, as to the requirement of the patient's consent the author is well aware of the difficulties involved, particularly in the case of a person who is under the influence of drugs and whose mind may be uncertain and variable. Difficulties in application are admittedly not a conclusive argument against a law if it has a beneficial operation. But an attitude of caution may be pardoned where the author blandly asserts that the measure proposed is designed to meet the situation where the patient's consent to euthanasia is "clear and incontrovertible." Finally, it is questionable whether there exists among the medical profession "the dread of the law that now hangs over them," an opinion which would appear to conflict with the statement, attributed to Lord Dawson and many other medical men, that the practice of euthanasia is already widespread. May this not be the kind of situation which is better left to the ethics of the profession itself rather than invoking the machinery of legislation to give outward legal validity to a practice which seemingly meets with the approval of the great weight of medical opinion?

As to the equally controversial subject of abortion Dr. Williams makes a determined and convincing assault on the theological arguments advanced in condemnation both of existing medical practice and of the attitude of English law as embodied in Macnaghten J.'s famous judgment in *Bourne*, wherein therapeutic abortion is regarded as falling outside the purview of the Offences against the Person Act, 1861. The full implications of this judgment are discussed in a manner which should convince even the most sceptical and hesitant of medical practitioners of the protection afforded under the present abortion law. Comparison is also usefully made with the law and practice of other common law jurisdictions, and those who favour an extension of the existing law will not be slow to invoke the lessons derived from the Scandinavian countries' example in legalising abortion not only on medical grounds but also for humanitarian and eugenic reasons. To the present reviewer, however, the most absorbing section of the author's treatment of this subject is his comprehensive and lucid examination of the religious attitudes towards the basic issue whether an unborn child is as much entitled to protection as the mother. This leads the author into considering the much wider question whether law and immorality should be co-terminous. Recent public discussion has tended to concentrate attention on homosexuality and artificial insemination as particular aspects of this problem. In the present work Dr. Williams insists on the distinction being drawn between morals and law, and maintains that the true issue is not whether abortion is immoral but whether women who procure their own abortion and qualified surgeons who perform it for them should be punished through the instrumentality of the law of the land. This question, he says, cannot be answered in abstraction from the consequences of punishment, and when these consequences are found to involve social evils greater than the alleged evil of abortion itself the case for continuing the threat of punishment is evidently not made out. Should certain Members of Parliament who think along the same lines as the learned author be more fortunate in the ballot for private members' Bills, Parliament will soon have to face up to the question posed by Dr. Williams, *viz.*, whether it would not be better to permit abortions conducted by qualified practitioners than to tolerate the activities of the band of abortionists who are now a settled feature of our society.

J. LL. J. EDWARDS.

The Danish Criminal Code. With an Introduction by Dr. Knud Waaben, Professor A.I. in the University of Copenhagen. Copenhagen: G.E.C.Gad—Publishers. 1958. 119 pp. (D.cr. 20.)

There is a narrow limit to the number of foreign languages that an Englishman is capable of acquiring, and students of the criminal law will be grateful to the Danish Committee on Comparative Law for having this translation made. Dr. Waaben's commentary in his introduction is particularly valuable. Denmark is making a more energetic attack upon the problem of drunkenness than we are, and there is an interesting provision, which we need here also, rendering those who are drunk and dangerous liable to the penal law. The problem of insanity as a defence is simply solved by providing that for the defence to prevail it must be shown that the accused was both insane and " irresponsible "; the former question depends on the medical evidence, while the latter is for the court. Occasionally the courts have refused to find that an insane person is irresponsible, as where persons who have committed financial frauds have been suffering from a psychotic depression, but not so affected by the mental disease as to have been unable to carry on their business. But Dr. Waaben notes that in the vast majority of cases the courts hold the accused to be irresponsible if the psychiatrists have diagnosed a mental disorder amounting to insanity. His conclusion is that the provision has proved fully adequate, and has stimulated close co-operation between the legal profession and the psychiatrists.

The Danish Code adopts the useful idea of the day-fine, based on the earnings of the offender after making certain deductions; the imposition of so many day-fines draws the attention of the tribunal to the need for looking at the circumstances of the offender, and helps to equalise the incidence of fines between different offenders. A useful addition to the powers of the criminal court is the power to debar a convicted person from carrying on a business, or to require him to carry it on under certain forms, if the offence committed carries with it an obvious risk of abuse of the position (sections 78, 79). And where the defendant has threatened another with death, fire or other misdeed, he may be ordered to comply with the measures that the court finds necessary for obviating the apprehended menace (section 75).

In general the Code is simpler than our own law, though it does not always incorporate the refinements of wording that modern penal thought would suggest. The sections on acquisitive offences are particularly noteworthy to an Englishman, because they are so much superior to our own law of larceny.

GLANVILLE WILLIAMS.

Books Received :

Stone's Justices' Manual, 1958. Ninetieth edition by J. Whiteside and J. P. Wilson. London: Butterworth & Co. 1958. 2 Vols. cccxxvi. 3044 and (index) 227 pp. (Thin edition, 97s. 6d. net; thick edition, 92s. 6d. net.)

John Howard: Prison Reformer. By D. L. Howard. London: Christopher Johnson. 1958. 182 and (index) 4 pp. (18s. net.)

Crime of Passion. By Derick Goodman. London: Elek Books. 1958. 251 pp. (18s. net.)

Prison Governor. By Major B. D. Grew. London: Herbert Jenkins. 1958. 214 and (index) 5 pp. (21s. net.)

Causes of Crime. By Lord Pakenham. London: Weidenfeld and Nicolson. 1958. 193 and (index) 4 pp. (21s. net.)

Readers' Digest :

Criminology: The age of criminal responsibility: 225 *Law Times* 177.

Error: Conviction founded on error (based on *D. P. P.* v. *Head*): 225 *Law Times* 191.

Gaming: R. v. Aspinall, Burke and Osborne: 225 *Law Times* 229.

Road traffic: Driving—human automation (based on *Hill* v. *Baxter*): 102 *Law Journal* 260.

THE
CRIMINAL LAW
REVIEW

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Editorial

Editorial policy

We are always looking for ways in which *The Criminal Law Review* can be made more useful to our readers and, particularly, the ways in which its value as a practitioner's guide to the law can be enhanced. The second half of 1958 brings some changes in the format of some of our features, designed to assist our readers in using the *Review*. The principal changes are as follows: in "Case and Comment," we have tried to give a better idea of the points dealt with in the case by enlarging on the headings and sub-headings to the cases and by including a number of detailed cross-references; in "Acts and Orders" the order of things has been reversed and the substantive effect of the Act or Order is given greater prominence; the principles on which "Summary Justice" is compiled have been reconsidered and, in future, only cases of particular importance will be reported but in greater detail than hitherto.

The lighter side

On p. 421 of this issue readers will find the first of our monthly cartoons. They are drawn by Mr. Eric Burgin, a contributor to

Punch, and we hope that they will give as much pleasure to our readers as the previews of them have given to the Editors.

Margery Fry Memorial Fund

The death of Margery Fry has been a severe blow to all who are interested in the problems of crime and punishment.

The Howard League for Penal Reform is inviting donations to a Trust Fund which is to be created in Miss Fry's memory. We quote from their letter of appeal:

" Outstanding amongst her many interests was her life-long concern with the prevention of crime and the rehabilitation of offenders, and these will be the objects of the Memorial Fund. It is envisaged that the Fund might be used for such purposes as the granting of scholarships ; the financing of research schemes ; the setting up of pioneer projects for the rehabilitation of offenders ; and that it might perhaps help in some way to facilitate the establishment of an Institute of Criminology.

" We hope that as many people as possible will give generously to this Fund which would be devoted to the acquisition of a deeper knowledge and a fuller understanding of a complex human problem, and so perhaps prevent future suffering and unhappiness. Donations should be sent to:

John Cole, Esq., 66 Lincoln's Inn Fields, W.C.2,

who has agreed to be Hon. Treasurer."

Trial by jury

A recent suggestion by Sir Gerald Dodson, the Recorder of London, that " everyone " would welcome " a short Act of Parliament which would deprive drivers accused of being under the influence of drink of the right to trial by jury," has been met in some quarters with the written equivalent of a gasp of horror, thus proving the suggestion wrong on at least one point. A letter to *The Times* on June 6 drew attention to Devlin J.'s statement in the eighth series of Hamlyn Trust lectures that one of the first things a tyrant would do would be to abolish trial by jury, and that this indicated, among other things, that it was " the lamp that shows that freedom lives."

What Sir Gerald was principally concerned with was the waste of time in the case before him, where the jury had been sitting a day and a half when a magistrate could, according to Sir Gerald, have disposed of the case in a couple of hours. As the *Solicitors' Journal* points out, economy is a bad reason for depriving people of their rights, and to single out such a serious offence as driving under the influence of drink for this deprivation would not be a good beginning. But it seems unlikely that the learned Recorder would make such a seemingly rash statement as he is credited with unless he had good cause, and it may be that, in some cases, the seriousness of the offence is doubted and a great deal of time is spent by a great many people on a very minor matter. Whether any satisfactory Act could be passed to deal with this type of case is doubtful, and if there is to be error, then the error had best remain on the side of freedom.

Laying an information

The recent attempt of Mr. Ivor Worth to obtain the issue of a warrant for the arrest of Archbishop Makarios for complicity in the murder, in Cyprus, of Mr. and Mrs. George Kaberry illustrates a principle of the criminal law which is not very often brought into play; that is, that unless an information is required by statute to be laid by a particular person any person may lay it where the offence is not an individual grievance but a matter of public policy and utility, and concerns the public morals.[1]

An information for a warrant is required by the proviso to section 1 (1) of the Magistrates' Courts Act, 1952, to be in writing and substantiated on oath. It is usual to take the information in the form of a deposition. In *Herniman* v. *Smith*[2] the House of Lords disapproved of a formal information phrased in technical language. Applications for summonses and warrants can be heard privately. As to offences committed outside England and Wales, a warrant may be issued under section 1 (4) of the Magistrates' Courts Act, by virtue of section 1 (2) (*c*), *i.e.*, if the person charged is, or is believed to reside or be, within the county or borough. Archbishop Makarios may be paying a visit to this country shortly in connection with the Lambeth Conference.

Mr. Worth's application was refused by the Bristol magistrates, although he submitted evidence of the Archbishop's activities taken from the White Paper on terrorism in Cyprus, which included letters which passed between the Archbishop and Colonel Grivas, the Eoka leader, together with extracts from the Grivas diaries. Mr. Worth also handed in a sworn statement by a former soldier who had served in Cyprus, Frank Myers, who alleged that he had been approached by terrorists to steal arms from his unit.

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[1] *Cole* v. *Coulton* (1860) 24 J.P. 596.

[2] [1938] A.C. 305.

Mr. Worth is considering carrying his application further, while Major-General Sir Edward Spears, former M.P. for Carlisle, has said that he has engaged legal assistance for the parents of men murdered in Cyprus who wish to apply for warrants for the arrest of the Archbishop if he visit this country.

R. v. Edgar and Others

It has been drawn to our notice that in the above case, [1958] Crim.L.R. 400, Mr. M. D. L. Worsley (who appeared for two of the appellants) addressed the court on the question of whether the magistrate was required by rule 5 (2) of the Magistrates' Courts Rules, 1952 (which requires one of the examining magistrates to " sign the depositions ") to sign the actual depositions or whether his signature on a jurat (*i.e.*, a certificate attached to the depositions) at the close of each hearing was sufficient. Although the question is not specifically dealt with in the judgment of the court, the case must now be an authority for saying that the magistrate's signature on a jurat is sufficient to satisfy the rule.

It is regretted that in the report of the case Mr. Worsley's initials were wrongly stated.

Metropolitan Police Act, 1839 (Amendment) Bill

This Bill received its Third Reading in the House of Commons on May 16. Mr. David Renton, Joint Under-Secretary of State for the Home Office, is considering a suggestion made by the Member for Southend East that a Government circular should be sent to local authorities, other than those in the Metropolitan Police area, suggesting that they should bring their by-laws into line with the provisions of the Bill (H.C. Debates, Vol. 588, cols. 817–822, May 16).

Suicide and attempted suicide

The Home Secretary has said that he is not yet ready to reach a conclusion on the subject of whether or not suicide and attempted suicide should continue to be criminal offences. In his deliberations Mr. Butler is considering the report of the joint committee set up by the British Medical Association and the Magistrates' Association, whose recommendation that there should be a change in the law has been unanimously accepted by the Council of the Magistrates' Association (H.C. Debates, Vol. 588, col. *1483,* May 22).

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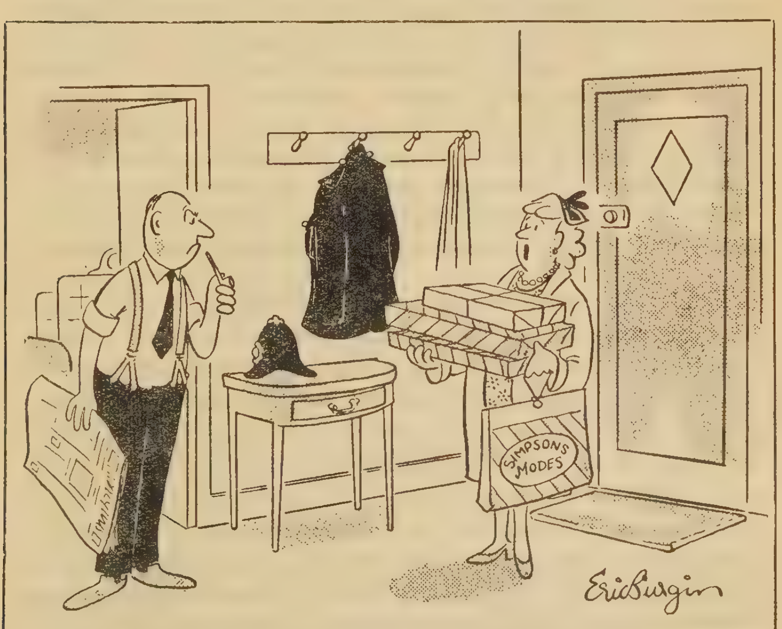

"I was proceeding up the High Street in a northerly direction when I observed in the window of Simpson's dress shop. . . ."

The Brighton Conspiracy Case

By Henry Palmer

On February 3, 1958, Trevor Ernest Heath, John Richard Hammersley, Anthony John Lyons, Samuel Bellson and Charles Field William Ridge pleaded not guilty at the Central Criminal Court to an indictment charging conspiracy to obstruct the course of public justice. On February 27, after a trial lasting nineteen days, the jury found Heath, Hammersley and Bellson guilty and Lyons and Ridge not guilty. The case, involving as it did so many witnesses and incidents, was not easy for the reader of the daily press to follow. It is for this reason that the writer of the present article has endeavoured to summarise the case in the course of the following pages.

At the time of the trial, Heath, Hammersley and Ridge were members of the Brighton borough police force. Before suspension Heath was a detective-sergeant, Hammersley a detective-inspector and Ridge Chief Constable. Lyons had been for over eight years the manager of a bar in Brighton called Sherry's Bar, and Bellson was a bookmaker with premises in Brighton. The conspiracy alleged against the five accused was that they " between January 1, 1949, and October 18, 1957, conspired together and with other persons unknown to obstruct the course of public justice in that Heath, Hammersley and Ridge should act contrary to their public duty as police officers in relation to the administration of the law."

Motion to Quash the Indictment

Before the arraignment counsel for Ridge (Mr. Geoffrey Lawrence, Q.C.) submitted that the indictment was bad in law on three main grounds: (1) because the words " should act contrary to their public duty as police officers in relation to the administration of the law " did not give to the accused reasonable information, or indeed any information, as to the nature of the charge and, therefore, the indictment was bad for uncertainty; (2) because, although this indictment charged only one conspiracy, the depositions disclosed that there was a series of conspiracies; this was supported by the fact that over the whole nine-year period there was not one of the accused who was common to all the transactions nor

(3) because it would be contrary to the interests of justice that the accused should be tried upon an indictment which, *inter alia,* precluded them from obtaining an acquittal upon such matters as the prosecution failed to establish and which did not give the accused any information as to the case to be met. Counsel for the other defendants also addressed the court in support of the submission.

The submission was opposed by the Solicitor-General, who appeared for the Crown, on the grounds that the indictment did give reasonable information as to the nature of the charge and that the facts showed one conspiracy with one object. In the circumstances of the case it was right to present the conspiracy as one enduring throughout each of the instances which were said to be separate conspiracies but which were, in fact, several methods adopted by the conspirators to carry out the purpose of the conspiracy, namely, to obstruct the course of public justice. It would have been difficult to lay specific charges with regard to some of the transactions which were alleged against the accused, and the indictment as it was presented the essence of the offence charged in the most convenient form.

After counsel for the defendants had replied to the submission of the Solicitor-General, Mr. Justice Donovan ruled, without delivering a formal judgment, that the motion was dismissed.

The Evidence

The evidence called by the Crown in support of the conspiracy was, of course, evidence of " overt acts," that is to say, acts done in furtherance of the object of the conspiracy. The case for the prosecution was that there was a conspiracy between the defendants and others to obstruct the course of justice evidenced by a number of separate overt acts done on different dates by different parties to the conspiracy, but all done with one object, namely, that the police officers concerned should act contrary to their public duty. The overt acts are broadly classified below under nine headings, and it will be seen that Lyons was alleged to have been concerned in only one episode (head (4)), Ridge in two ((2) and (4)), Bellson in three ((1), (2) and (7)), Hammersley in five ((1), (2), (3), (8) and (9)) and Heath in eight (all save (1)).

(1) *The " Barnard Episode "*

This occurred in August, 1954, and was alleged to concern Hammersley and Bellson only. Barnard, who was an ex-police officer, said he had to serve a writ on Bellson and went to the magistrates' court where he saw Heath. He asked Heath to point out Bellson to him and Heath did so. Barnard then served the writ on Bellson outside the court. Some days later he noticed he was being followed by a police car and when he went into a public-house Hammersley and another officer named Campbell followed him in. Hammersley then came up to him and said: "You used police information to serve a writ on Bellson. You watch your step. We have got to look after Sammy Bellson. Keep your mouth shut or we will fix you."

Hammersley in his defence said that having seen what occurred at the magistrates' court he took the view that Barnard was involving the police in civil matters and that, when he subsequently saw Barnard in the public-house, he said to him, not what Barnard alleged, but that if he (Barnard) used police information he should be more discreet about it. Later he saw Barnard getting information out of the police record office and told him to keep out.

Bellson said that he was served with a writ in the precincts of the court. He saw Heath point him out to Barnard but he did not object. He made no complaint to Hammersley about it nor did Hammersley ever speak to him about it.

Detective-constable Campbell said that he did not hear the conversation in the public-house, but heard Hammersley afterwards tell Barnard to keep out of the police record office.

Summing up to the jury on this matter, Mr. Justice Donovan pointed out that, if Hammersley was taking the rather extreme view that the police might be involved in civil proceedings, one would have expected him to rebuke Barnard on the spot. Instead, according to Hammersley, it was left to a chance encounter in a public-house some days afterwards. The jury were directed that the mention of Bellson at that moment by Hammersley was no evidence against Bellson because he (Bellson) was not present, but, if the jury accepted Barnard's version that the writ was served outside the court, the significance was that Hammersley stood in so close an association with Bellson that he resented even a High Court writ being served upon Bellson and Bellson must have told Hammersley about it.

(2) *The "Leach Episode"*

This occurred in December, 1954, and was alleged to concern Heath, Hammersley, Bellson and Ridge. Leach junior bought some jewellery from a man named Roberts, and also lent him some money on the security of some watches. The jewellery and watches turned out to have been stolen. Heath and Hammersley went to see Leach junior and took away the property. On the next day Leach junior went to his father's office and saw Bellson there.

Bellson said he thought he could get the prosecution of Leach junior washed out and, with that end in view, Leach senior gave him £50 and later another £50. Two days later Hammersley and Heath called on Leach junior again when, according to Leach junior, Hammersley told him he could arrange to have the evidence dropped in the sea for £250. He (Leach junior) was indignant and told them to go, and they did so. He thought his father was present at that interview, but Leach senior did not think he was and heard no mention of £250. Leach senior, however, confirmed that he gave Bellson £100 altogether.

Leach senior also said that he had an interview with Ridge. He could not remember the date and could not be sure that it was not after the interview with his son and Heath and Hammersley. At that interview, according to Leach senior, Ridge said: " The boy has got himself in a spot of bother," to which he replied: " Well, all of us have made mistakes in our lives; all I can ask you to do is to do the best for him." That was all that was said, except that as Ridge was leaving he said: " Well, whatever you do, Harry, keep within the law," and recommended a particular solicitor.

Both Hammersley and Heath denied having suggested the payment of £250 to dispose of the evidence. Heath also said that after their first interview with Leach junior he met him at his (Leach junior's) request and told him he was not willing to discuss the matter, but would ask Hammersley to see him. Bellson was there. He telephoned to Hammersley who came and spoke to Leach junior, but he (Heath) stood apart with Bellson and did not hear what was said. He only heard Hammersley advise Leach junior to see a solicitor. According to Heath and Hammersley Leach senior tried to bribe them at a subsequent interview.

Bellson agreed that he was with Leach junior when Heath spoke to him, but said he did not hear what was said, nor did he hear the conversation when Hammersley came.

Ridge said that he went to see Leach senior because he had known him for a long time and had been told that he (Leach senior) had tried to bribe the police. He (Ridge) had asked Leach junior to leave the room and had simply told Leach senior to see a solicitor and to keep within the law whatever he did.

Two police officers called by the prosecution said that when they interviewed Bellson in October, 1957, Bellson said that he had been sent along to Leach senior by Ridge " to do some business for him." Bellson, however, denied this in evidence.

Summing up to the jury on this matter, Mr. Justice Donovan pointed out that what was alleged to have been said by Bellson to the two police officers in 1957 was no evidence in law against

Ridge. In any event the jury, having seen Bellson in the witness box, might take the view that they would not hang a cat on his evidence, let alone a chief constable. Unless the jury accepted the evidence of Leach senior that he had given Bellson £100 and were satisfied that Ridge went to see Leach senior in order to get something for stopping the prosecution, then they must dismiss the matter from their minds. As to Heath and Hammersley the allegation against them was that they asked for £250 and the evidence about that rested on the word of Leach junior alone. That evidence would be rather dangerous and flimsy upon which to find that these two officers made this request.

(3) *The "Mitchell Episode"*

This occurred in December, 1954, and was alleged to concern Heath and Hammersley only. A man named Mitchell told Waite (as to whom see head (8)) that he was intending to break into a jeweller's shop in Brighton and asked if he (Waite) would buy the stolen property. Waite told Hammersley with the result that the shop was watched and Mitchell and another man were convicted. According to Mitchell's evidence, while he was in prison awaiting trial, Hammersley and Heath visited him with some papers to be signed. In the course of the interview either Hammersley or Heath said to him: "You can help yourself, you know," to which he replied that it was no good because he had no money. When asked why he thought he was being asked for money, he said: "Well, I know Sergeant Heath and Sergeant Hammersley."

Heath in his defence said that it was he who was interviewing Mitchell and not Hammersley. He might have said that Mitchell could help himself, but if so he only meant by disclosing where the stolen property was; he was certainly not suggesting a bribe. Hammersley said that he was dealing with other prisoners and denied any suggestion of trying to obtain a bribe.

Summing up, Mr. Justice Donovan said that on this matter it was Mitchell's word against Heath's and Hammersley's; Mitchell was a man with a criminal record.

(4) *The "Astor Club Affair"*

This occurred about Easter 1955 and was alleged to concern Heath, Lyons and Ridge. The proprietor of the Astor Club was a Mr. Bennett who said that at an interview with Ridge and Lyons (who ran a bar close by known as Sherry's Bar) it was arranged that on payment of £20 a week to Ridge he should be permitted to keep the club open after hours. According to Bennett, Lyons named the figure of £20 in Ridge's hearing as the price for keeping the club open. At first he paid the money to Ridge when he called once a week, but later Heath called for it each week. Until October of that year, when Bennett closed the club, the club regularly stayed open until the early hours of the morning; it was never raided and no police action was ever taken against it.

Bennett's wife confirmed her husband's evidence. She said she had seen her husband hand over money to Ridge and later to Heath, and that she had twice received a telephone call from Heath not to open the club that night.

Evidence was also given by a Mrs. Cherryman who lived in a flat in the Astor Hotel above the club premises. She had lent money to Bennett and was worried about the club being kept open after hours and went to the police about it. On the occasion of one visit she saw Ridge and asked him to look into the late hours and disorderly conduct at the club. She also said in evidence that she had seen Lyons and Heath at the club after permitted hours.

A further prosecution witness was Mrs. Mason, who said that she reopened the Astor Club in January, 1956. Shortly after that Lyons came to see her and told her that Bennett had opened and closed when he liked and that it had cost him money to do so. She had the impression, she said, that she was being sounded to see if she would do the same. Subsequently she had kept to the permitted hours, but was eventually struck off the register after some eighteen months for selling to non-members.

Heath, Lyons and Ridge all completely denied the allegations made against them. Heath said that he never obtained any money from Bennett as a bribe, that he was never in the Astor Club after hours and that he had never been sent by Ridge to get money. Lyons said that he never made the arrangement for £20 a week to be paid to Ridge, that he did not go to the Club after hours and that he never had the alleged conversation with Mrs. Mason. Ridge said that he was not introduced to Bennett at the Astor Club but at Sherry's Bar and that he never received any money from Bennett.

Summing up, Mr. Justice Donovan told the jury that if one wanted to describe this episode in a sentence one would say that it was a case of "power without plenty being opposed to money without morals and losing the contest through weakness of will." This was a question of oath against oath with one side clearly lying. In ascertaining the truth the jury should bear in mind that Bennett was a man with a criminal record lasting until 1948, and also, if his story was true, he was an accomplice upon whose evidence it was dangerous to convict without corroboration. The jury had heard that Mrs. Mason had lost her licence through selling to non-members and would no doubt be cautious about accepting her evidence. Unless the jury were satisfied that the only rational explanation of the unchecked lawlessness of the Astor Club was police connivance, they should dismiss the matter from their minds.

(5) *The " whack of the £1,000 " episode*

This occurred in June or July, 1955, and was alleged to concern Heath alone. A man named Walker who had apparently stolen about £1,500 in Lowestoft, came to the Astor Hotel. One night he was arrested by Heath while dining with Mrs. Bennett at another hotel. Later the same night Heath and two other officers, Campbell and Wiggins, came to the Astor Hotel and spoke to Bennett. According to Bennett, Heath pointed out to him that it might be awkward for his wife and, when he (Bennett) suggested that there was no reason to bring her into it, Heath said: " Well there is no reason why that should be done; you are always generous, Alan." Heath then told Bennett that Walker had alleged that he (Walker) had lost £1,000 in his room in his (Bennett's) hotel and he suggested that he (Bennett) had got it, but said that all could be forgotten if he had a whack out of the £1,000. Bennett denied he had the £1,000, but gave Heath £30 to keep his wife's name and that of the hotel out of the papers.

Bennett's evidence was confirmed by his wife.

The two other officers, Campbell and Wiggins, gave evidence and said they remembered Heath taxing Bennett with having had the £1,000, but denied that they heard him ask for a share of it. Their evidence differed, however, as to the length of the interview and as to whether the safe was searched.

Heath agreed that the missing £1,000 was referred to but denied asking for a share of it or receiving £30 as a bribe either for keeping Mrs. Bennett's name or the hotel out of the newspapers or for anything else.

Summing up to the jury Mr. Justice Donovan said that, with regard to the alleged bribe of £30, Bennett, if his version was true, was an accomplice so that the warning the jury had been given that it was dangerous to convict without corroboration applied. Unless the jury could decide with confidence that the Bennetts were telling the truth, they should treat the matter as in doubt and disregard it.

(6) *Various allegations of bribery concerning Heath only*

Under this head fall five episodes which occurred between the summer of 1955 and about May, 1957, and which concerned Heath alone. The first alleged incident occurred when, according to Bennett, Heath showed him a photograph of himself (Bennett) taken from police records, saying how surprised he (Heath) and " the guv'nor " were. He (Bennett) said he had paid for his past, so what about it? Finally Bennett said that this was a mild form of blackmail and he had a good mind to write to the Home Secretary about it. Then, according to Bennett, Heath told him not to be silly, that there was no harm done and that nobody else would see it.

Heath's explanation was that he showed the photograph to Bennett just to confirm that it was Bennett, to keep him inactive and perhaps to persuade him to go elsewhere.

Summing up to the jury Mr. Justice Donovan pointed out that there was nothing criminal in Heath's actions over this matter but that, if the jury accepted Bennett's version, it was a matter to be taken into account when considering all the evidence bearing upon Heath's case.

The second alleged incident occurred in about August, 1955, when Heath told Bennett, according to Bennett, that there was an inquiry for Bennett in Leeds about a worthless cheque and that he (Bennett) would have to go to Leeds to see the police. When Bennett said that he could not go in the middle of the season and asked Heath whether he could arrange that he need not go, Heath said that anything could be arranged within reason. Thereupon Bennett gave Heath £15 or £20 and heard no more.

There was evidence that the Leeds police did not in fact want Bennett in Leeds. They wanted him interviewed in Brighton.

Heath said he remembered nothing of this matter, except that he received no money, but his diary showed that he visited the Astor Hotel on August 26 in connection with the matter and he subsequently dictated a letter to the Chief Constable, Leeds, saying that Bennett had been closely questioned and that since he (Bennett) had been in Brighton there had been no suggestion of any criminal activities on his part.

Summing up Mr. Justice Donovan pointed out to the jury that only a few weeks before Heath had told Bennett (in the presence of two other officers) that he was suspected of stealing £1,000 from a guest in his (Bennett's) own hotel, and yet there was a message going to Leeds that " there had been no suggestion that he (Bennett) had been engaged in any criminal activities " ; of course, Bennett was an accomplice in this matter but, if the jury thought that the letter to the Leeds police was written improperly to protect Bennett, there was corroboration of Bennett's story.

The third alleged incident occurred in about September, 1955, when, according to Bennett, Heath came to him and asked him to help him to purchase a car and to lend him some money on the security of a ring. Bennett gave Heath £70 and took the ring which he afterwards sold for £27.

Heath said that this was a bona fide transaction, but only for £50, not £70 as Bennett said.

Mr. Justice Donovan, summing up, said that this was just one of the matters, together with the "whack" of the £1,000, the matter of the police photograph and the matter of the Leeds inquiry, which was put forward by the prosecution for the jury's consideration; but the jury should disregard it unless they were satisfied that it had been established.

The fourth alleged incident occurred at the end of 1956 and the beginning of 1957 and concerned a Mrs. Brabiner and a Mrs. Lawrence. Mrs. Brabiner performed an illegal operation at her flat. Heath and another officer saw her and she admitted it and asked if they could accept some money to forget about it. Later Heath saw Mrs. Brabiner alone and, according to her, he asked her for some money saying that although he could not get her out of all her trouble he would do his best to help her. Later still Mrs. Brabiner arranged for her friend, Mrs. Lawrence, to hand Heath £25. He at first refused it, but, according to Mrs. Brabiner, after she (Mrs. Brabiner) had telephoned him, he (Heath) met her by appointment and accepted the £25 from her. Later she gave him another £15 and later still two more amounts of £10 and £3 and finally £8.

A Mr. Betts said that Mrs. Brabiner showed him £25 in notes and that he saw her get into Heath's car.

Heath denied that he received any money from Mrs. Brabiner, although, according to him, she had tried to bribe him.

Mrs. Lawrence said that she also had given money to Heath. She had introduced the girl upon whom the illegal operation had been performed and had supplied the syringe; and she said she gave Heath £50 to keep her name out of the case. She borrowed the money in two lots from a Mr. Thorn.

Thorn confirmed that he lent Mrs. Lawrence two amounts of £25 and that, after Mrs. Brabiner had been sentenced, Heath came up to him in a public-house and said: "The money has been worth it."

Heath denied that he received anything from Mrs. Lawrence and that, as to the remark he was alleged to have made to Thorn, what he said was: "The trouble has been worth it."

Summing up to the jury, Mr. Justice Donovan said that both Mrs. Brabiner and Mrs. Lawrence were accomplices. The question was whether there was such corroborative evidence to enable the jury to take these matters into account in determining the truth of the incidents.

The fifth alleged incident occurred in May, 1957, and concerned a man named Swaby, who was then under arrest for housebreaking. Swaby said that Heath came to see him in the cells and he (Swaby) asked Heath to help him in regard to offences which he wanted to be taken into consideration. Heath said, according to Swaby: "Well, it's up to you," to which Swaby replied: "What do you mean?" Heath then said: "Well, you've been around: don't beat about the bush." Swaby thereupon gave Heath two £5 notes which he had hidden in the hem of his coat. Later he saw Heath again and asked him to leave one item out of his previous record. Heath then said he would do it for a "pony" and Swaby said he would get his wife to bring the money to court at his trial.

Mrs. Swaby said she saw Heath before the trial and Heath asked her: "How are you fixed for £50?" She said that she would try to get the money.

A police officer named Hovey confirmed the conversation about a "pony," which took place in his presence, and said that he was at the court for the trial. Heath asked him to go out and see if Mrs. Swaby had brought in anything: he did so, and came back and told Heath that Mrs. Swaby had said it was hopeless. Heath sent him out again, but he returned with a message that she had only enough money for her fare back to London. Swaby was convicted, and afterwards Mrs. Swaby, who had in the meantime visited her husband, saw Heath when he said to her: "You see what has happened; you did not look after me, so I did not look after your husband."

Heath denied having received any money from Swaby or asking him for a "pony." He admitted sending Hovey out of court to see Mrs. Swaby, but said that it was in connection with the recovery of stolen property.

Summing up to the jury Mr. Justice Donovan said that the jury would ask themselves why Hovey should invent this story. If the jury accepted the evidence of Hovey, Swaby's evidence was corroborated up to the hilt. The jury would, no doubt, also take into account the fact that Hovey had not at once reported this matter and had said the reason was a sense of loyalty to Heath.

(7) *The attempt to corrupt P.C. Knight*

This incident occurred in June, 1957, and was alleged to concern Heath and Bellson only. Police-constable Knight was at that time engaged with another officer in watching clubs in Brighton.

On June 4, according to his evidence, Heath saw him and said: "Are you interested in earning a tenner a week?" and explained that Bellson would give him £10 a week to tell him when his club (known as the Lonsdale Club) was going to be raided. Knight told Heath that he was not interested, whereupon Heath said: "It will be all right; your job won't fall flat because the frequenters will be there" (which he (Knight) understood to mean: "It will look as though the raid has been a successful one but Bellson himself won't be there"). Knight repeated that he was not interested, and Heath said: "All right, it's up to you; I was to get £5 for fixing it, but that won't break me; I have other fiddles, as you know; don't tell anybody else about this."

Heath denied the conversation and said that he only spoke to Knight about an absentee named Weaver.

Bellson denied making any offer of £10 a week to Knight.

Summing up to the jury Mr. Justice Donovan said that the jury would again ask themselves why Knight should invent this conversation. As in the case of Harvey there was a failure to report the matter at once and, if the jury thought that this failure could not be explained simply on the basis of one colleague not wanting to let down another, they should dismiss it from their minds. But if the jury accepted Knight's evidence then, so far as Heath was concerned, that evidence was damning and they might well wonder at the brazenness and the frankness of what was said. As to Bellson, the jury might have regard to this incident, even though he was not present, if they thought that Bellson was responsible for the attempt, if any, to corrupt Knight.

(8) *The shielding of Waite and other matters*

Under this head fall four episodes which occurred between the end of 1953 and September, 1957, and which were alleged to concern Heath and Hammersley only. Although the writer has tried to group all episodes in chronological order, it will be seen that the first of these four incidents was, in fact, the very first of all in point of time, but it was thought convenient to deal with all these matters concerning a man named Waite under one head.

The first of these incidents was an alleged "gentleman's agreement" with Waite. According to the evidence of Waite, towards the end of 1953 he and Hammersley came to "more or less a gentleman's agreement" that he (Waite) would inform Hammersley if he got to know of anything stolen in Brighton on the understanding that, so long as he did not receive any goods stolen in Brighton, he (Waite) would be free to deal with stolen goods, and would be given the "tip-off" to get rid of any such goods if he should become suspect. According to Waite, Heath knew about this agreement in 1954. Since the agreement he (Waite) had received a quantity of goods stolen outside Brighton from a man called Richardson.

The second incident concerning Waite occurred in 1956 when Waite received two consignments of stolen groceries. According to Waite's evidence, Hammersley, who knew the thief, saw some of the first consignment, and a fortnight later he (Waite) gave Hammersley £50. When the second consignment arrived later in the year a police officer saw them being unloaded and spoke to Waite. A few days later Waite asked Hammersley if the officer had reported the matter. Hammersley said: " No," and he (Waite) gave him another £50. No action was ever taken against Waite in respect of the groceries. After that, according to Waite, both Hammersley and Heath used to come to a shop which he was managing and would buy about £2 worth of goods and only pay 10s. for them.

Both Heath and Hammersley denied the existence of any " gentleman's agreement " and denied either receiving any money from Waite or buying anything from Waite's shop without paying the full price.

Summing up to the jury Mr. Justice Donovan pointed out that, if Waite's evidence was true, Waite was an accomplice and that the warning as to convicting without corroboration applied. The jury should not put these matters in the scales of evidence in respect of Heath and Hammersley unless they felt that they could trust Waite.

The third alleged incident occurred at about the beginning of August, 1957. A very large quantity of cigarettes were stolen in London and were apparently offered to Waite. Waite went to see a tobacconist in Brighton named Wyatt and offered the cigarettes to him. Wyatt wrote to Superintendent Williams of the Brighton police, mentioning Waite's name. The letter was shown to Heath, and Hammersley was put in charge of investigations into the matter. On August 7 Waite told Hammersley that the cigarettes were being offered and Hammersley was prepared to treat him as an informant. A little later Hammersley told Waite that they had received a letter about the cigarettes. A day or two afterwards Superintendent Moody, who was investigating the theft in London, came down to Brighton with other officers. Neither Hammersley nor Heath told them that Waite had been named as a receiver of the stolen cigarettes by Wyatt.

On August 18 Hammersley and Waite went to London so that

Waite could point out where the stolen cigarettes were and, according to Hammersley, Waite pointed out a disused British Road Services depot. Moody was told, but when he visited the site he found it was no more than an old bombed site overgrown with vegetation where apparently no vehicle had been for years.

Meanwhile Waite said that he received a telephone call from Richardson who offered him thirty cartons of cigarettes. Moody was told that the offer had been made, but not by whom, and it was arranged that Waite should buy two cartons. The next day Waite told Hammersley that it was Richardson who was offering the cigarettes and Hammersley said: " Oh, my God; I can't have Freddie done; I must go down and get him to burn the cartons."

On the next day Waite met Hammersley and Richardson and it was arranged that Richardson should supply Waite with cigarettes in packets of ten or twenty so that, as Hammersley said, if he were discovered he could say that they were part of the two cartons he was authorised to buy.

Later Moody sent a man down from London to watch Waite's house and, a few days later, the man saw Waite and another man put two cartons into a car and take them to the shop of which Waite was manager. A warrant was obtained, the shop was searched and the cigarettes found. Subsequently Mrs. Watson, who was the owner of the shop, said that Heath told her: " I didn't think you would be such a fool as to have them on the premises " and he then suggested a false defence for Waite and told her to ring up Hammersley and Richardson. She did ring up Hammersley and told him about the suggested defence.

Hammersley in evidence said that he thought Waite was simply an informant. He did not tell Waite to buy any cigarettes from Richardson. He did not know that Richardson was involved and never saw the letter from Wyatt implicating Waite.

Heath denied doing anything to shield Waite or making the alleged remark to Mrs. Watson or suggesting a false defence.

Mr. Justice Donovan, summing up to the jury, pointed out that, if Hammersley had not seen the letter from Wyatt implicating Waite, he might well have thought that Waite was simply the informer, whereas if Hammersley had seen the letter it was clear he must have known that Waite was acting, not as an informer, but as a disposer of the stolen property. There were two versions of these events and the jury would have to decide between them.

The fourth incident occurred in about September, 1957, when a Mr. Ketley, who once worked for Waite, made a statement to Heath implicating Waite in the matter of receiving the second consignment of groceries in 1956. On the same day Waite went to see

Ketley and accused him of informing against him about those goods. Heath told Hammersley about the matter and Hammersley told a Sergeant Johnson. Mrs. Watson said that she heard Hammersley tell Waite that Ketley had informed against him.

Both Hammersley and Heath denied having told Waite who the informant was.

Summing up to the jury Mr. Justice Donovan pointed out that Waite had been to see Ketley to accuse him of informing on the very day that Ketley had made his statement. Somebody must have told Waite about the statement; but only three people—Heath, Johnson and Hammersley—knew about it and all three denied that they disclosed it. There was nothing to contradict Heath's denial, so that the incident, if the jury accepted it, ought to be treated as affecting Hammersley alone.

(9) *The Bournemouth and Folkestone robbery inquiries*

These incidents occurred in June and July, 1957. The first was alleged to concern Heath and Hammersley and the second Heath only. Bennett, who had closed the Astor Club in October, 1955 (and in the meantime had been abroad and later started a business in London), was in Brighton in June, 1957, when Heath hailed him and came up to his car. Heath said that there was an inquiry for Bennett from the Bournemouth police over a robbery in that town involving £6,000 which had taken place in April, 1957. Thereupon Bennett gave Heath £10. That evening at the police station he saw Heath and Hammersley and told them that he wanted the Bournemouth matter investigated and cleared up. Heath went out of the room twice to telephone to the Bournemouth police and on his return said that everything was all right. When Bennett exclaimed: " What, just like that? " Heath said: " Yes, just like that; I have told them you were abroad at the time and our word is good enough." According to Bennett, the officers did not check his statement that he was abroad at the time of the robbery either by looking at his passport or in any other way. Before Bennett left, Heath said to him: " Don't forget John " (*i.e.*, Hammersley), whereupon Bennett took out two £5 notes and threw them on the floor near Hammersley, who said: " Thank you, Alan." Bennett said he did that because Hammersley had never asked him for money, nor had he given any money to Hammersley in the past.

Both Heath and Hammersley admitted the occasion but denied receiving any money from Bennett. Heath said he told the Bournemouth police that Bennett was out of the country at the time of the robbery.

Officers of the Bournemouth police confirmed having spoken to Heath on the telephone and said they assumed that Bennett's passport had been checked.

Subsequently, when Bennett was in London, Heath telephoned to him and told him to come down to Brighton immediately. In the course of another telephone call Heath told Bennett that he (Bennett) was in plenty of trouble because there was a warrant out for him in respect of a robbery at Folkestone. It was arranged that they should meet at a public-house in Brighton to discuss the matter. Bennett did not keep the appointment but went to Scotland Yard instead. The next day Bennett telephoned Heath who told him that he had waited a long time in the public-house and asked why he (Bennett) had not kept the appointment. Bennett said that he had made inquiries from the police in London and found out that it was all right. Heath then said, according to Bennett: "That is not my information; however, a half [*i.e.*, £50] will put it all right down here." Bennett did not, however, hand over any money to Heath.

Heath admitted making the telephone calls, but denied asking for £50. He said that the whole object was to entice Bennett down to Brighton so that he (Heath) could arrest him.

Summing up to the jury Mr. Justice Donovan said that, with regard to the Bournemouth robbery, the fact was that, after Bennett's interview with Heath and Hammersley, he (Bennett) was never troubled again about that matter. The jury might think that Bennett avoided further inquiry with rather considerable ease. It was for the jury to decide whether they thought that Bennett's story was an invention and, unless they were satisfied that it happened as Bennett alleged, they should disregard it. With regard to the Folkestone robbery, the evidence against Heath rested upon Bennett's word; and Bennett was not, in this matter, an accomplice because he had refused to part with any money. The issues were on the one hand the prosecution saying: "Here is another instance of Heath trying to get a bribe," and on the other Heath saying: "Not so; I never asked for anything; I merely wanted to arrest the man." It was, however, clear that this was the affair of the Folkestone police so that Heath need have done no more than tell the Folkestone police what he knew. But unless the jury were satisfied that Heath did suggest this bribe, the matter should not go into the scales against Heath.

The Direction on Conspiracy

Mr. Justice Donovan, summing up, directed the jury that conspiracy was an agreement between two or more persons to do some unlawful act or between two or more persons to do some lawful act by unlawful means. The word " agreement " in that definition needed a little explanation. Of course, conspirators did not write it all out and sign and seal it, and the agreement was very seldom even by word of mouth. It was more often than not a tacit understanding between conspirators as to what should be done, and the agreement constituted the offence.

An example of conspiracy was two people agreeing to go and burgle a house. If they implemented that agreement and burgled the house, they had committed two offences: (1) agreeing to do that, conspiracy; and (2) burgling the house, burglary. In such a case, however, it was sufficient to charge the offenders with the one offence of burglary.

In the present case the prosecution said that there was one conspiracy because, although there were a number of separate incidents, the central hub was always the same, namely, the three police officers, and the result was always the same, namely, the obstruction of justice for money. The scheme touched an unhappy father; later on it made contact with a club proprietor; later still it made contact with a receiver of stolen goods; but the hub of the affair remained constant as did the object. A metaphor which the prosecution might have used in this case was that of a country at war. There might be many battles in many parts of the world and some combatants would fight and die, when others would take their place, and allies might come and go; but there would be only one war, not as many wars as there were battles. Thus, where there was one unlawful design shared by a number of conspirators, it did not matter in law that the unhappy father, the club proprietor and the receiver of stolen goods had never met and may not even have known of the others' existence; they might, nevertheless, in law be participants in the same conspiracy if they were parties to a common unlawful purpose.

His Lordship then referred to the case of *R.* v. *Meyrick and Ribuffi* (21 Cr.App.R. 94) and said that in that case a police officer named Goddard had been convicted, with a Mrs. Meyrick and a man named Ribuffi, of a conspiracy concerned with allowing certain clubs to serve drinks out of hours. The following passage [1] was read to the jury:

> " It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may

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[1] From the judgment of Lord Hewart C.J. at p. 99, citing the words of Fitzgerald J. in *R.* v. *Parnell and Others,* 14 Cox C.C. 515.

> be parties to the same criminal agreement. Thus, in some of the Fenian cases tried in this country, it frequently happened that one of the conspirators was in America, the other in this country; that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same object."

After a further passage had been read, his Lordship said he hoped he had made it plain in the present case that, if the common purpose of these three police officers was to take bribes in return for refraining from doing their duty—and, therefore, obstructing justice—and if Lyons and Bellson shared in that common purpose in their own ways and at their own times, then there was one conspiracy here and not several. What the jury had to decide was: was there such a common purpose?; and was each of the accused a party to it, whether they corresponded with one another or not and whether one knew the other was in it or not?

It had been said by a judge over one hundred years ago that conspiracy was a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose held in common between them; and so in such a case a jury was not asked, Aye or Nay, did the accused do some particular thing, but did they from these things find a conspiracy proved. Therefore, in the present case the jury were not asked, Aye or Nay, was the Leach matter proved; Aye or Nay, was the Astor Club matter proved; Aye or Nay, was the Waite matter proved; or any of the other matters. The prosecution said that the evidence established a common criminal purpose, namely, the obstruction of justice, and that all the accused shared in that common purpose at different times. What the jury had to do was, taking all the matters of evidence into consideration, to say, Aye or Nay, were the accused persons guilty of the conspiracy alleged.

Conclusion

After considering their verdict for over four hours, the jury found Heath, Hammersley and Bellson guilty and Lyons not guilty. After further consideration for an hour (and after a further direction), the jury found Ridge not guilty. The following day Bellson was sentenced to three years' imprisonment and Heath and Hammersley to five years' imprisonment each.[2] So ended the Brighton conspiracy case, described in the words of Mr. Justice Donovan as

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[2] For appeals against these convictions, see p. 470, *post*.

" one of the most serious that have been tried in this or any other criminal court for a long time. The ordinary criminal," added his Lordship, " is problem enough for society, but if those who are paid to protect us against him, instead join forces with him, a much more deadly enemy appears upon the scene, because, so far as these guardians turned criminals are concerned, the community's defences are for the moment down; and until the difficult tasks of detection and conviction are accomplished much harm may be done, because he . . . is not only familiar with the devices of the crook . . . but by the very nature of his office he will not readily be suspected."

Automatism and Involuntary Conduct

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(*continued from p.* 367, *ante*)

(B) Unconscious Involuntary Action

Having considered in outline the law relating to conscious involuntary conduct, it should be possible to view the problem of automatism in a rather clearer perspective.

Although and, in part, because automatism is comparatively rarely encountered in practice, the difficulties it presents to the criminal lawyer are fairly formidable, raising issues of causation and mental illness with which he is largely unfamiliar and about which even the medical profession speaks with some hesitancy. Basically, it poses a " public health or safety problem calling for therapy or even custodial commitment " rather than the usual problem of correction which one finds in criminal law, though in view of the possibility of negligence preceding the involuntary conduct, the latter is not entirely excluded. Ignoring, for the moment, the question of negligence, one would expect automatism, like action committed under physical compulsion, to afford complete exemption from criminal liability, whatever the nature of the offence charged though, unlike it, to entail therapy where possible, and detention where necessary if involuntary conduct is likely to recur: against the desirability of exempting an accused person from all liability in respect of conduct he knew nothing about, one must obviously offset the right of society to enjoy adequate security free from his involuntary incursions.

Ideally, the solution should be found in the provisions of civil, and not criminal, law. Unfortunately, as Devlin J. remarked in *Hill* v. *Baxter* (unless the accused is certifiable), " the only restraint known to the law is indefinite detention (as an insane person) in what used to be called a criminal asylum." [19] In view of this inadequacy, if the automatism is such that the conduct is likely to recur, there should at least exist the safeguard that the accused may, in appropriate cases, be found " guilty but insane " and detained. This, of course, would technically amount to an acquittal.[20] Since automatism necessarily implies that the accused did not know the nature and quality of his act, the M'Naughten Rules *should,* if necessary, be applicable to such a case. If, on the other hand, it can safely be predicted that his conduct is not likely to recur, having regard to the cause of the automatism, there can be no point in finding him insane and detaining him in Broadmoor. The M'Naughten Rules should always be inapplicable to such a case and, in the absence of proof of culpable negligence, the accused should be completely acquitted. The question, therefore, which must be considered, is whether the provisions of English criminal law in fact produce this result.

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[19] [1958] 1 All E.R. 193, at p. 197.

[20] *Felstead* v. *R.* [1914] A.C. 554.

(i) *Application of the M'Naughten Rules to automatism.* The first apparent obstacle is a procedural one, namely the traditional view that the issue of insanity, being " in the nature of a defence . . . must therefore be raised by the accused or on his behalf." [21] Fortunately, this has recently been overcome by judicial interpretation, at least sufficiently for the purposes which are here considered. In *R.* v. *Kemp,*[22] the accused set up a defence of automatism in answer to a charge of causing grievous bodily harm to his wife. For obvious reasons, he did not raise the issue of insanity. Nevertheless, Devlin J. appears to have held that once the defence has led evidence of insanity, the judge or prosecution may raise the issue of insanity and, since the evidence of the accused disclosed insanity within the meaning of the M'Naughten Rules, he directed the jury to return a verdict of " guilty but insane." It is worth noting that this principle has since been very recently applied,[23] as it was suggested in this *Review* that it might be applied,[24] to the case of the person who puts forward the defence, to a charge of murder, of diminished responsibility under section 2 of the Homicide Act, 1957, and his own evidence discloses that he was actually insane within the meaning of the M'Naughten Rules. Having regard to the obvious inadequacy of the traditional view, the principle is clearly a sensible one and it is, perhaps, slightly strange that Devlin J. himself placed considerable emphasis in *Hill* v. *Baxter* on the fact that the respondent had not set up a defence of insanity. While, it is true, " it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act, 1930," it should not be surprising, in view of *R.* v. *Kemp,* to find that an accused person, by putting forward a defence of automatism in order to secure a complete acquittal, had in effect committed himself to Broadmoor. Today, defence counsel is faced with an awkward dilemma in cases of automatism: whether to play for safety and offer a plea of guilty in the hope that his client will escape with a light punishment, or to plead automatism in the hope of an acquittal and run the risk of his client being found insane. Whilst this is hardly the best way of dealing with insane persons who decline to plead insanity, it at least offers some solution to a difficult problem and is probably justifiable in the interests of society. Whatever its theoretical role in the criminal law, automatism must, for practical reasons, be used with extreme caution.

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[21] Cmd. 8932, at p. 79; see, for example, the comments of Barry J. in *R.* v. *Charlson* [1955] 1 All E.R. 859, at p. 860.

[22] [1956] 3 All E.R. 249; Crim.L.R. 774.

[23] *R.* v. *Bastian* [1958] 1 All E.R. 568.

[24] Griew, " Diminished Responsibility and the Trial of Lunatics Act, 1883 " [1957] Crim.L.R. 521–529. See further [1958] Crim.L.R. at p. 144.

This, of course, assumes that if the automatism is such that the involuntary conduct is likely to recur, it may be caught by the M'Naughten Rules. The accused admits, indeed argues, that he did not know the nature and quality of his act, but was his ignorance due to a " defect of reason, from disease of the mind " within the meaning of the Rules? These words, too, have been widely reinterpreted by Devlin J. in *R.* v. *Kemp* so as to include diseases, whether permanent or temporary, and whatever their origin, which are capable of affecting the mind so as to cause a defect of its reasoning and understanding. This is wide enough to exclude only " brutish stupidity without rational power." [25] In *Hill* v. *Baxter*, the learned judge stated: " For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. If, however, disease is present, the same thing may happen again and, therefore, since 1800 the law has provided that persons acquitted on this ground should be subject to restraint." [26] If the cause of the automatism is likely to manifest itself again in unconscious involuntary conduct, it is surely more likely to be caught by the definition adopted in *R.* v. *Kemp*. Although this, too, hardly presents an ideal solution, at least in the absence of some other possible form of restraint it is the best available. It should, however, be noted that this interpretation of " disease of the mind " can be too widely applied to automatism, and it should not always be necessary to apply the M'Naughten Rules even if involuntary conduct is likely to recur. This point will be more fully considered in due course.

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[25] See further, *R.* v. *Kemp, loc. cit.*, n. 22, at p. 254.

[26] [1958] 1 All E.R. 193, at p. 197. There is a noticeable difference of emphasis in the two judgments of Devlin J. In the later, the likelihood of recurrence is stressed, quite rightly, it is submitted. In the earlier, Devlin J. stated that it was irrelevant, for the purposes of insanity, whether the disease was temporary or permanent in nature and whether it was curable or incurable.

(ii) *Scope of automatism as a defence.* Leaving aside, for the moment, the problem of negligence and the crucial question as to which causes of automatism should and should not perhaps be covered in practice by the M'Naughten Rules, it is worth first considering the potential scope of automatism as a defence and whether it applies to some or all offences.

It has already been submitted in this article that automatism should exempt a person from criminal liability in respect of all conduct however serious in nature unless it is likely to recur, in which event there should sometimes, but not always, be at worst a technical acquittal represented by a finding of insanity. Negligence preceding the involuntary conduct presents a completely separate issue, since the accused should be punishable for his negligence and not for his subsequent conduct. Provided one can adequately cope with the public health or safety problem by means of the M'Naughten Rules and for the correction problem, which may arise in respect of negligence, by the ordinary means of criminal law, there can be no point in punishing a person for conduct he committed unconsciously, whether or not it caused substantial injury to others. Automatism should be a full, or at least a technical, defence to offences of homicide and absolute prohibition alike. Yet in *Hill* v. *Baxter,* in which the court made heavy weather of the fact that the offences charged were (said to be) absolutely prohibited, one finds Devlin J. stating: " I do not find it necessary . . . to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration: *the answer would certainly depend among other things on the nature of the liability which the prosecution had to establish.*"[27] Why, with respect, *should* this be so?

Unfortunately, it may indeed be so because of the confusing reasoning which the courts have adopted in the past. It will be recalled that in the course of his judgment in *Hill* v. *Baxter,* Lord Goddard stated that " there was in fact no case in either English or Scottish law where a defence of automatism had been set up or been the subject of judicial discussion." Unless this is playing with words, and the statement is entirely omitted in the All England Reports, it is quite clearly wrong. In his work entitled "*Criminal Law: The General Part*" published in 1953, Dr. Glanville Williams cites no less than three English cases and one

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[27] *Ibid.*, at p. 196.

Scottish case in which a defence amounting to automatism was upheld,[28] as well as a decision of the Court of Criminal Appeal (delivered by Lord Goddard!) in 1951, in which the effect of automatism on the "similar facts" rule was considered and the accused acquitted.[29] In *R.* v. *Charlson* in 1955,[30] a man apparently suffering from a brain tumour, who threw his son out of a window not knowing what he was doing, was acquitted on three separate charges of aggravated assault. In *R.* v. *Kemp* in 1956[31] the fact that the accused was suffering from the effects of arteriosclerosis when he unconsciously struck his wife with a hammer resulted in a finding of insanity despite his plea of automatism. Finally, in *R.* v. *Martin,*[32] which was heard at the Central Criminal Court less than two months before *Hill* v. *Baxter* was heard by the Divisional Court, the accused was acquitted of causing grievous bodily harm with intent, in respect of hitting a woman on the head with a spanner, after evidence had been given by the senior medical officer at Brixton Prison that he "was suffering from a condition known as hypoglycaemia—a deficiency of sugar in the blood—which would cause him to act as an automaton and he would not know what he was doing." It may seem curious, therefore, to regard automatism as raising a "novel point" or as never having been "the subject of judicial discussion," particularly as the court in *Hill* v. *Baxter* took nearly a fortnight to consider its judgment and the two judges who expressed these views had both been involved in recent decisions relating to automatism.

Some of the doubt surrounding the scope of automatism as a defence can probably be explained. In all of the cases mentioned, the offences charged required proof of *mens rea,* either in the form of a specific intent or at least of foresight of consequences, and it is quite clear that a person who does not know what he is doing neither intends nor foresees the consequences of his conduct. In all but one of the cases the accused was either completely or at least technically acquitted because he lacked *mens rea* in this sense, though in the case relating to "similar facts," *R.* v. *Harrison-Owen,*[33] he was acquitted on the grounds that automatism, if proved, negatived the *actus reus* and was not a defence of absence of *mens rea* and, therefore, previous convictions in respect of similar conduct should not have been used in evidence against him. It has already been suggested, in agreement with the view of Dr. Glanville Williams, that for these purposes the distinction between denial of *mens rea* and denial of *actus reus* should be irrelevant and can only lead to unfortunate conclusions, as it did in *R.* v. *Harrison-Owen.* Indeed, the distinction can conceivably only even *appear* relevant if, as in that case, it seems to affect some other rule of law or evidence or, as in *Hill* v. *Baxter,* the offence charged is said to be absolutely prohibited and no question of *mens rea seems* to enter into the offence. But even if one reasons that, as in the case of duress and coercion, the requirement of voluntariness affects the element of *mens rea,* then the fact that an offence is said to be absolutely prohibited should only mean that there is no need to prove a specific intent or at least general foresight of consequences. It should not mean that it is not a defence to prove that the conduct was involuntary. If, on the other hand, one reasons as in *R.* v. *Harrison-Owen,* and there is good authority for doing so [34] even if the acquittal in that particular case was unnecessary, that the requirement of voluntariness affects the *actus reus* aspect of an offence, then even this superficial problem disappears. As in cases of conduct committed under physical compulsion, the accused is exempt from criminal liability, whatever the offence charged, because it is "not his act." Indeed, of all the types of involuntary action considered in this article, automatism most closely resembles conduct committed under physical compulsion, insofar as in neither has the accused even an apparent choice to make, though obviously automatism presents additional problems.

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[28] *R.* v. *Stone* in 1936, *R.* v. *Price* in 1949, *R.* v. *Paltridge* in 1952, and *H.M. Advocate* v. *Fraser* in 1878. The first three cases were apparently not officially reported, which may account in part for Lord Goddard's statement. See further, Williams, *loc. cit.*, n. 11, at p. 11.

[29] *R.* v. *Harrison-Owen, loc. cit.*, n. 11.

[30] *Loc. cit.*, n. 21.

[31] *Loc. cit.*, n. 22.

[32] *The Times*, October 25, 1957. It is interesting to note that automatism has recently been raised, in an original form, as a plea in divorce; see *Benton* v. *Benton* [1957] 3 All E.R. 544.

[33] *Loc. cit.*, n. 11.

Despite the confusion which was generated by the fact that the offences charged were said to be absolutely prohibited, it is probable that at least two members of the Divisional Court in *Hill* v. *Baxter* were prepared to recognise that a defence of automatism involves the denial of an act in criminal law and, therefore, can obviously be of general application. Thus, in the course of the hearing, Pearson J. said, "If he is unconscious in the full sense, he is not driving . . . ", to which Lord Goddard added "Any more than a man who dies while at the wheel," [35] stating subsequently in his judgment "that there may be cases where the circumstances are such that the accused could not really be said to be driving at all." [36] Although the examples of automatism which both considered would provide a complete defence understandably enough concerned dangerous driving, the reasoning employed is clearly applicable to all criminal charges. The vital question relates not to the type of offence charged but to the type of automatism disclosed and, with respect, the answer should not "certainly depend among other things on the nature of the liability which the prosecution had to establish."

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[34] See further, the discussion in Williams, *loc. cit.*, n. 11, at pp. 10–15.

[35] *Loc. cit.*, n. 2.

[36] [1958] 1 All E.R. 193, at p. 195.

(iii) *The effect of negligence preceding automatism.* This, too, presents a problem which is worth carefully examining. It is generally considered today that criminal liability is not normally applicable to conduct which is merely negligent: except in cases of absolute prohibition and in a restricted group of offences such as manslaughter *and dangerous driving,* in which the argument in favour of dispensing with proof of *mens rea* or of accepting negligence as sufficient is thought to be particularly strong, it is usually accepted that a person should only be criminally liable in respect of consequences which he actually foresaw or, if the offence charged requires a specific intention, which he actually intended. Although the prosecution is aided by the presumption that a person intends the natural consequences of his acts, and the requirement of foresight is sometimes ignored by judicial interpretation of the offence in question, as has recently occurred in the case of murder, it is widely thought, particularly by academic writers, that the concept of constructive knowledge founded upon negligence "generally speaking has no place in the criminal law."[37] Yet, as one writer in particular has recently shown,[38] the fact remains that criminal liability based on negligence is much more prevalent in practice than is generally appreciated, and to his illustrations may be added, for example, the numerous cases in which a person has foreseen the consequences of his acts yet may be held criminally liable for having failed to act reasonably, *e.g.*, as in duress, self-defence and defence of property.[39] The latter, admittedly, are analytically distinguishable from the cases in which a person is liable for failing to exercise the foresight of a reasonable man, though even then there may sometimes be, as in the case of manslaughter but not of murder, sound justification for founding liability on negligence. Indeed, the substitution of this form of liability for strict responsibility would mark a welcome advance in English criminal law.[40]

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[37] See the statements by Devlin J. in *Roper* v. *Taylor's Central Garages* (*Exeter*), *Ltd.* [1951] 2 T.L.R. 284.

[38] Edwards, *Mens Rea in Statutory Offences* (1955), particularly in Chapter IX, pp. 190–216.

[39] *Supra.*

[40] See further, ref. murder, Prevezer, "Murder by Mistake" [1956] Crim. L.R. 375 and, ref. absolute prohibition, 11 *Current Legal Problems*, *loc. cit.*, n. 17.

The policy in favour of punishing negligent conduct preceding acts committed under automatism is, it is conceded, a debatable one. If, as has been shown, the accused is in fact insane within the meaning of the M'Naughten Rules and pleads automatism as a defence, then he may, if necessary, be detained in Broadmoor or in a Broadmoor institution, irrespective of whether or not he was negligent. If, on the other hand, his conduct is not likely to recur but was preceded by negligence, and he pleads automatism as a defence, then it can be argued that he should no more be liable for failing to exercise reasonable foresight than any other person charged with negligently committing a criminal offence who, generally speaking, is today exempt from liability, at least in theory. If, in practice, one could always subdivide the cases in this way, there would perhaps exist no particular justification for specifically punishing negligence preceding the conduct of an automaton. But there exists, in fact, an important intermediate case, namely, that of the person whose conduct is only likely to recur if he fails to take reasonable preventive measures, and to such a case, it is submitted, the M'Naughten Rules should generally not be applied. An obvious example is the diabetic who is liable to act as an automaton unless he takes regular doses of insulin or some other drug. It would, it is submitted, be both unjust and somewhat impracticable to detain as insane all diabetics who act under automatism, yet it is surely justifiable to exercise a tighter hold over them than over other people. Admittedly, even if they were not to be held liable in respect of their negligence, the fact of a trial, albeit ending in an acquittal, should put them on their guard in the future and they would find it difficult to establish on subsequent occasions that they lacked foresight of the consequences of their omissions, in respect of which they would be punishable like any other person who is under a duty to act and advertently fails to do so. This would mean that the diabetic, like the proverbial dog, should generally be entitled to one lapse. On the other hand, such persons as diabetics and epileptics seem to present a particular case in favour of basing liability on negligence, and provide unusually strong support for the argument that, "Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting (or failing to act), to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct (or inaction). To some extent, at least, this motive may promote awareness and thus be effective as a measure of control."[41]

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[41] *Loc. cit.*, n. 8. The words in parenthesis are the present writer's.

Moreover, the fact that a criminal court can impose conditions on discharge of such persons and thus more effectively ensure that they take reasonable precautions in the future warrants, it is submitted, basing liability on negligence in such cases. Finally, the fact that it may be possible to found criminal liability on negligence may, in practice, serve to deter a criminal court from detaining as insane someone who can safely be treated while at large, though this argument can be carried too far by appearing to justify a conviction in respect of conduct committed under automatism and without prior negligence.

Does the criminal law in fact provide for liability in respect of negligence preceding automatism ? Certainly the Divisional Court in *Hill* v. *Baxter,* following the view of Humphreys in *Kay* v. *Butterworth,*[42] seemed to assume that it does in the case of dangerous driving. The assumption is probably justified with regard to this and other offences *which have traditionally been regarded as based on negligence,* though, strictly, the definition of such offences should be in terms, not of acts or omissions, but of conduct which includes such acts or omissions. Moreover, the principles of causation in criminal law should assist, in practice, in distinguishing negligent from non-negligent conduct. But it is difficult to see how, strictly, there can be liability for negligence if the offence charged requires proof of actual foresight or, *a fortiori,* of a specific intention. Thus, whilst one can apply the principle in relation to manslaughter or, nowadays, murder, one cannot do so in relation to inflicting grievous bodily harm or to assault generally. Yet, although the diabetic who negligently fails to take his insulin is almost certainly more likely to injure than to kill under automatism, he can be found criminally liable in the latter case but not in the former, which seems illogical, irrespective of the severity of the offences concerned. One must, therefore, conclude that, unless considerable ingenuity is employed in interpreting the requirements of an offence, it is theoretically impossible in most cases to punish culpable negligence preceding conduct committed under automatism, however desirable it may be to do so.

(iv) *Legal classification of the causes of automatism.* It has already been suggested that, for the purposes of criminal law, it is necessary to divide the causes of automatism into two main categories, those which are likely to lead to a recurrence of involuntary conduct and those which are not. Whereas the latter should provide complete exemption from criminal liability, the former should entail therapeutic treatment where possible and also detention if the accused cannot safely be left at large.

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[42] (1945) 110 J.P. 75. See, for example, *Henderson* v. *Jones* (1955) 119 J.P. 304.

The first category, it has been submitted, calls for a further subdivision into causes which can adequately be guarded against whilst the accused is at large and those which, in the public interest, necessarily require his detention. Unfortunately, unless the accused is certifiable or, charged with an offence which can be committed by negligence, has been culpably negligent in the past, the M'Naughten Rules provide the only available means of dealing with all such cases. Once the accused has pleaded automatism and it is apparent that he can be found insane within the current extended interpretation of the Rules, there is no legal method of preventing them being applied even if he can perhaps safely be left at large. It must be conceded that, save in the exceptional cases mentioned above, they afford the only certain guarantee that, for some time at least, he will cease to be a menace to the general public. However, this guarantee can be purchased at too high a price and, on balance, it is submitted that it may be preferable to acquit entirely rather than to detain as insane where it is highly likely that the accused will adopt appropriate precautions in the future, in the added knowledge that he will otherwise certainly be less leniently treated by the courts. Obviously many factors, personal to the case, may warrant an exception to this general principle, *e.g.*, the extreme likelihood of recurrence, particularly if without any, or generally inadequate, warning, the past neglect and habitual carelessness of the accused,[43] but not alone, it is submitted, the extreme seriousness of the offence charged. Although in these circumstances, the public interest may warrant additional precautions, each case must be considered on its own merits.

Which causes of automatism seem to lend themselves to this tripartite classification ? This is often really a question for the medical expert but some causes at least can be briefly considered here, however complex some of them may be.

(1) *Apparently involving no particular likelihood of recurrence*

An obvious instance of this type of cause of automatism, which is often cited in the courts and in the text books, is where the accused is rendered unconscious by an entirely accidental and unforeseeable mishap. If, for example, he is knocked out by a flying stone and his car collides with another or he brushes against someone in falling to the ground, he should clearly not be held guilty of dangerous driving or of assault nor can he be detained as insane. Similarly, a reflex action, caused, *e.g.*, by a swarm of bees or a blow on the knee, whilst not strictly covered by the meaning of automatism adopted in this article since the accused is fully conscious at the time, is not a directed movement for which he should perhaps be held responsible and does not require a criminal conviction. Furthermore, though this may give rise to collateral problems, a person acting in an extreme state of inebriation or under the influence of a drug may also come within this group for the purposes of automatism.

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[43] It is recognised that there may be a certain evidentiary difficulty in this respect.

One of the most difficult problems is presented by hypnosis. Strictly, as Dr. Glanville Williams states, " Hypnosis is not a state of unconsciousness." Moreover, it is arguable that it should be legally relevant that " the weight of (scientific) opinion favours the view that a hypnotised person cannot be forced to perform acts that are repugnant to him." [44] Nevertheless, although, unfortunately, this conclusion is opposed to that of Dr. Williams, it is submitted that hypnosis should, at any rate in most cases, (if it is legally possible to draw a dividing line), provide complete exemption from criminal liability. The mere fact that perhaps the most a hypnotist can do " is to remove an inhibition and cause the subject to commit a crime to which he is already inclined " is not a sufficiently convincing reason, to the present writer at least, in favour of criminal liability. As the American Law Institute has stated, the " dependency and helplessness (of the hypnotised subject) are too pronounced." [45] Even if it is true that hypnotism merely involves the removal of an inhibition, the fact that the subject would probably not have performed the acts in question had his inhibition not been removed through no direct fault of his own, should generally favour an acquittal. Many persons are saved from being criminals by the force of their inhibitions. To except the subject of hypnosis seems particularly unfair, especially if the hypnotist has had great difficulty in overcoming the inhibition. Hypnosis possesses attributes common to both physical compulsion and duress and, like them, should provide a complete defence.

Another difficult problem, which can only briefly be considered, is that presented by conduct committed during somnambulism whilst sleepwalking or during the twilight states between sleeping and full awakening. If the sleepwalking is due to a neurosis or, as present medical opinion indicates,[46] may be associated with nocturnal epilepsy, then there may be a likelihood of recurrence, and such cases should be considered as within one of the next two categories. If, on the other hand, it is likely to prove an isolated phenomenon, then conduct committed whilst sleepwalking should entail neither full conviction nor detention as insane, and in two of the English cases on sleepwalking, cited by Dr. Glanville Williams in 1953, the accused was acquitted.[47] In another of the English cases he cites, a marine who attacked his corporal with a bayonet whilst in a clouded, twilight state of consciousness, not having fully recovered from a dream, was also acquitted, a conclusion which seems correct in view of the actual facts of the case and may, for other reasons, arouse some sympathy.[48]

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[44] *Loc. cit.*, n. 11, at p. 12.

[45] *Loc. cit.*, n. 8, at pp. 126-127.

[46] *Loc. cit.*, n. 11, at p. 317.

(2) *Involving likelihood of recurrence but perhaps safe to release*

This category, like the next, can generally be covered by the M'Naughten Rules but, unlike it, should perhaps preferably not be, if possible. On the contents of both, the present writer is obviously not qualified to speak and they must always be a matter for expert medical opinion. However, since, having regard to the inability of the law to exercise general control by way of liability for negligence, the issue is usually one of complete acquittal or detention as insane, certain causes of automatism appear often to warrant the risk of release. Particular examples are diabetes (and hypoglycaemia) and epilepsy: the former can normally be effectively combated by the taking of drugs, and it would seem harsh in most cases to detain a person in Broadmoor merely to ensure that he takes the appropriate dosage in the future, though the occurrence of negligent lapses in treatment must weaken the force of this argument. Epilepsy would seem generally to come within the same category, though in this case the safeguard perhaps lies less in the treatment available than in the fact that an epileptic, even if suffering from the "grand mal," has some recognisable warning of the imminence of an attack.[49] Obviously, the shorter the warning, the greater the danger to the public, and the stronger the argument in favour of detention. In any event, complete freedom of action must usually be denied by law and, for example, under the Road Traffic Act, 1930,[50] the applicant for a driving licence must state whether he suffers from epilepsy and, by the Motor Vehicles (Driving Licences) Regulations, 1950,[51] an epileptic is precluded from claiming a driving test. Breach of these provisions obviously presents a separate problem, but the importance of this and of automatism in this form should not be minimised in view of the fact that there are thought to be between one hundred thousand and two hundred thousand persons in Great Britain suffering from some form of epilepsy.[52]

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[47] *R.* v. *Stone* and *R.* v. *Paltridge, loc. cit.*, n. 28.

[48] *R.* v. *Price, loc. cit.*, n. 28.

[49] See further, the issue of the *British Medical Journal* of March 22, 1958, and the several articles therein discussing various aspects of epilepsy.

[50] s. 5 (1). This is not specifically stated in the subsection but epilepsy is, of course, one of the illnesses which one must disclose on the application form.

[51] No. 333, S.I. (1950), made under s. 30, Road Traffic Act, 1930.

(3) *Involving likelihood of recurrence and probably unsafe to release*

The causes of this type of automatism are extremely involved and virtually impossible for the layman adequately to summarise, let alone discuss. Three instances may be cited by way of illustration. For example, certain extreme cases of hysterical fugue may perhaps warrant a finding of insanity.[53] Similarly, in *R.* v. *Kemp,* it will be recalled, arteriosclerosis was thought, in that particular instance, to be sufficiently dangerous in character to justify detention of the accused as insane. Although, in *R.* v. *Charlson* a year earlier, the accused was acquitted and it was stated that he was not insane within the meaning of the M'Naughten Rules,[54] the case is difficult to reconcile with *R.* v. *Kemp*; it may, therefore, be surmised that if in the future a person is found to have acted as an automaton due to the effects of a brain tumour, his ignorance of the nature and quality of his act may well be ascribed to "a defect of reason from disease of the mind," particularly if the tumour is inoperable or there is no probability that the accused will submit to an operation.

Conclusion

Although the crucial question in automatism, more often than not, is a medical one, this has hardly been touched upon in this article. It involves problems concerning which a court of law must be guided by expert medical opinion. What has been attempted here is a consideration of how the criminal courts in fact deal with it, and ought to deal with automatism, assuming that these problems can be adequately answered. The present law is obviously at fault in many respects, particularly in regarding automatism as an issue which can be dealt with by the ordinary machinery of criminal justice. If this continues to be the case, then one can only hope that the courts will appreciate the inadequacies of the law while making the best use of the limited means available to them. At least, if defects are clearly exposed, some reform may one day eventuate.

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[52] *Loc. cit.*, n. 49, at p. 672.

[53] *Loc. cit.*, n. 11, at p. 318.

[54] *Loc. cit.*, n. 30, at p. 860.

Murder and the Reasonable Man

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(*continued from p.* 382, *ante*)

Intention and inevitable consequence

The analysis discussed above does not mean that the *mens rea* in the offence of murder is to be judged by a purely objective standard, since the analysis makes it clear that in every offence of murder two questions arise for determination, namely, (1) Was the act that the accused is alleged to have done an intentional act? and (2) Was that act of such a quality as would inevitably produce death or grievous bodily harm? The second question is indeed an objective one, for as Holmes rightly observed, since the object of the criminal law is to compel men to abstain from dangerous conduct it requires them at their peril to know the teachings of common experience.[38] Stephen put it in another way by observing that except in cases of madness the law assumes that every man has the capacity of knowing the nature and consequences of the act done.[39] The first question, however, is clearly a subjective one, and in order to rebut the allegation that the act was intentional the accused may put forward the following defences, namely, accident, mistake, drunkenness and insanity. In addition, since the passing of the Homicide Act, 1957, the accused may put forward the defence of diminished responsibility.[40]

If the two senses in which the word act is used are borne in mind, it is clear that the defence of accident may take either of two forms, and in both forms it is denied that the consequences were intended. In the first place the accused may deny that the act in its narrower sense was intentional. Hale gives a curious illustration of this form. In discussing homicide *se defendendo* he observes: " In homicide *se defendendo* there seems necessary some act to be done by the party killing, for if he be merely passive, this will make it only a killing *per infortunium*. A assaults B, who flies to the wall, or falls holding his sword, knife or pike in his hand. A runs violently or falls on the knife of B without any thrust or stroke offered at him by B, and thereupon dies. This is death *per infortunium*." [41] A modern case of this form of accident was *R.* v. *Larkin* (29 Cr.App.R. 18). The accused was charged with murder, and it was undisputed that the deceased had died as a result of her throat being cut by a razor wielded by the accused. The defence of the accused, which succeeded, was that the deceased was drunk and swayed against the razor, and that accordingly he did not cut her throat intentionally.[42]

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[38] *Common Law*, 57.

[39] H.C.L. II, 115.

[40] In order to escape the inevitable consequence principle the accused often pleads a mental blackout in some such terms as " Everything went blank," or " I cannot remember what I then did," or, as Philpot pleaded, " I did not know what I was doing exactly." It is worth while remarking in connection with such pleas, most often specious and untrue, that they usually afford conclusive evidence that the accused was in fact a reasonable man. It is because he, being a reasonable man, is fully aware of the consequences which would ensue from the act which he did, that he says that his mind was not functioning at all; it can scarcely be said that Philpot, for example, did not realise that extreme manual pressure on his wife's throat would, if prolonged for five minutes, result in death. It

In the second form of this defence the accused, whilst admitting that the act in its narrower sense was intentional, may allege that he was mistaken as to a surrounding circumstance from which the act in its wider sense derived its intrinsic quality. Again Hale gives an excellent illustration of this. A, who was troubled with deer in his cornfield, set himself to watch at night in a hedge, and set his servant to watch in another corner of the field with a gun. He gave orders to the servant to shoot if he heard any rustling in the cornfield. The master unwisely ran into the field, and the servant,

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was because of this very realisation that he pleaded that he did not know what he was doing. An insane man would have said: " I knew what I was doing, but what if I did, it could cause her no harm."

In *R.* v. *Charlson*, 39 Cr.App.R. 37 the accused was charged with (i) causing grievous bodily harm to his son with intent to murder, (ii) causing grievous bodily harm with intent to do him grievous bodily harm, and (iii) unlawfully and maliciously inflicting grievous bodily harm. The prisoner struck the boy, aged ten years, on the head with a mallet, and threw him out of the window. The prisoner stated that he remembered hitting the boy, but did not know why he had hit him, and the next thing he remembered was being in his car. He was a devoted father, and there was no obvious motive for the act and no provocation. There was medical evidence that the prisoner was suffering from a cerebral tumour, and that a person so suffering was liable to an outburst of impulsive violence over which he had no control at all. The prisoner was undoubtedly sane. Summing up, Barry J. said: " If he did not know what he was doing, if his actions were purely automatic, and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit, and no responsibility rests on him at all, the proper verdict is not guilty." Such a defence appears to be a variant of accident; in the same case Barry J. said that if the elements of consciousness are not present the act is accidental.

[41] 1 Hale 480.

[42] Thus, the defence in *Hedley's* case, *ante*, was that the car was not driven intentionally against the deceased. Other cases where this defence was put forward were *Woolmington* [1935] A.C. 462; *Jarmain*, 31 Cr.App.R. 39.

in accordance with his orders, shot into the corn, thinking it to be the deer, as a result of which the master was killed.[43] Another illustration of this form of accident is afforded by the old case Kelyng 41 discussed by Foster,[44] where A picked up a pistol in the street, which he tried with a rammer which was apparently too short. He carried the pistol home, and thinking it to be unloaded, pulled up the cock and touched the trigger, as a result of which the pistol went off thereby killing his wife.

The defence of accident, if it succeeds, may or may not negative negligence. In the case of the master having been mistaken for deer Hale remarked: " It seemed to me that if the master had not given such direction (*i.e.*, to shoot on hearing a rustle) that was the occasion of the mistake, it would have been manslaughter to have shot at a man, though by mistaking him for a deer, because he did not use the required care to discover his mark, but shot directly at the person of a man though mistaking it for a deer." Whether, however, negligence is negatived or not, the defence of accident, if it succeeds, will negative the allegation of *mens rea* essential to establish the offence of murder, for the issue here is not whether the accused was negligent, but whether he intentionally performed the act the inevitable consequence of which would be death or grievous bodily harm.

There is a subtle distinction between the defences of mistake and accident, for, whereas in accident the accused does not intend to bring about the consequences of his act, in mistake he actually does so intend.[45] A leading case on the defence of mistake is that of *R.* v. *Levett* (1638) Cro.Car. 538, where a man killed the deceased, thinking her to be a burglar. In such cases as these, the accused forms the deliberate intention to kill or to inflict grievous bodily harm, and the important question arises which is this: Is it sufficient for the accused to establish that he honestly believed that he was entitled under the circumstances to kill or to inflict grievous bodily harm in order to negative the *mens rea* of murder? Such authority as exists upon this point is completely conflicting.

In commenting on *Levett's* case Foster remarks: " Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used." [46] This observation clearly shows that in Foster's opinion honest belief would negative the *mens rea* for murder, although if the accused had no reasonable grounds for the belief he would be guilty of manslaughter.

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[43] 1 Hale 476.

[44] Foster 263.

[45] See Salmond, *Jurisprudence* (10th ed.), 410.

[46] Foster 299.

In *Nailor's* case (Foster 278 ; East 277) the prisoner was indicted for the murder of his brother. The facts were that he came home at night drunk, and was ordered by his father to go to bed. He refused to do so, and his brother hearing a scuffle between the father and the accused came down from his bed. The brother fell upon the accused, threw him down, and beat him upon the ground. He kept him down, so that he could not escape, nor avoid the blows. As they were striving together the prisoner inflicted upon the brother a wound with a penknife, from which he subsequently died. It was doubted whether this was manslaughter or *se defendendo,* and at a conference of all the judges it was held to be manslaughter, since there did not appear to be any inevitable necessity so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life but only to have chastised him for his misbehaviour. It will be observed from this that although the prisoner had no reasonable grounds for supposing his life to be in danger, there was no suggestion that he was guilty of murder.

In yet another case (1 Hale 470) an officer pushed early in the morning into a gentleman's chamber in order to arrest him, but neither informed the officer of his business, nor used words of arrest. The gentleman took down his sword, thinking him to have a felonious intention, and stabbed him. This was ruled to be but manslaughter. Hale remarks that that the bailiff had no weapon in his hand, from whence the prisoner might reasonably have presumed that his life or property were aimed at, and that, therefore, there seemed to have been a manifest want of caution in not demanding the reason for the intrusion.

In *R.* v. *Meade* (1 Lew. 184) the prisoner had given information to the authorities relating to smuggling activities by certain boatmen. In revenge they ducked him and were about to throw him into the sea when he was rescued by the police. Whilst the prisoner was walking away the boatmen threatened that they would come at night and pull his house down. Late at night a large number of persons gathered about his house, and sang songs and used violent language, and manifested hostile intentions towards him. The prisoner fired into the crowd, killing one of them, and alleged that he fired under apprehension that his house and life were in danger. On an indictment for murder Holroyd J. in directing the jury said: " If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger but that the pistol was fired for the purpose of killing then it is murder."

In *R.* v. *Rose* (1884) 15 Cox 540, the prisoner was charged with the murder of his father, and in defence pleaded that he thought his father was about to cut the throat of the prisoner's mother. Under this belief that his mother's life was in imminent danger he fired one shot in order to frighten his father, and then fired another shot which lodged in the father's brain, thereby killing him. In directing the jury Lopes J. said, "If you think that the prisoner acted without vindictive feeling towards his father when he fired the shot, if you think that at the time he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused from the consequences of the homicide. If, however, on the other hand, you are clearly of opinion that he acted vindictively, and had not such a belief as I have described to you, or had not reasonable grounds for such a belief then you must find him guilty of murder."[47]

The Commissioners of the Criminal Code Bill stated what they conceived to be the law as to the use of force as follows:

> "The use of force is subject to the restriction that the force used is necessary; that is that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."[48]

The first part of the statement that the force used must be necessary would rule out any defence of mistake altogether, for he who pleads mistake has necessarily used a degree of force which was not, in fact, justified by the actual facts of the case. The second part of the statement does, however, let in the defence of mistake, for the mischief which the person using force anticipates from its use is to be proportioned, not according to the evil which he *actually* avoids, but that which he *intends* to avoid. He may honestly form the intent to avoid death, although, in fact, death did not threaten him at all, as where, for example, A shot a man dead in a public disturbance who had raised his arm to throw at

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[47] This direction can hardly be described as satisfactory, since the prisoner, although he may have had no reasonable grounds for his belief, may yet have honestly thought his mother's life to be in danger. In that event he would not have acted vindictively, although he may have acted negligently. But negligence is not malice, for the essence of malice is that an intent to kill was formed without any justification or excuse. The sole issue was whether the prisoner did, in fact, act vindictively.

[48] Criminal Code Bill Commission Report 11. For a detailed discussion on the right of self defence, see Dicey, *Law of the Constitution*, 489.

A what A thought to be a bomb, but which was in fact, a stone.[49] A certainly formed an intent to avoid death, although from the size of the stone it was improbable that A's life was threatened.

The first observation which may be made upon this problem is that it is not sufficient for the accused to say that he believed he was entitled to kill. It is true that in the case of *Wilson* v. *Inyang* [1951] 2 All E.R. 237, Lord Goddard C.J. said: "A man may believe that which no other man of common sense would believe, but he may yet honestly believe it," but it is not the law that a man is entitled to form his own belief as to when he is entitled to kill. In other words, a mistake of law is no defence.[50] It is, therefore, incumbent upon the accused to produce evidence as to conduct on the part of the person killed, or as to the surrounding circumstances which caused him to form the belief that such a state of facts existed as would entitle him in law to kill. This will rule out *in limine* most cases where the accused used his right of self protection merely as a justification for attack. Where such evidence has been produced it must inevitably bring in the objective test, for a jury will scarcely hold that the accused honestly thought that he was entitled to kill unless there was something either in the surrounding circumstances or the conduct of the deceased from which an ordinary man would deduce that a legal justification for the act of killing had arisen. It is suggested that the so-called reasonable grounds insisted upon in the cases means no more than that the accused must introduce some evidence of fact from which the jury can conclude that his belief was honestly formed. Moreover, it is not incumbent upon the accused to persuade the jury that his belief was, in fact, an honest one, for it is sufficient if he introduces into the mind of the jury a doubt as to whether his belief was an honest one or not.[51]

Theoretically the defence of drunkenness is clear enough.[52] It is, however, important to realise that drunkenness may in itself induce accident or mistake, and if it does either of these defences is available to the accused. The issue is not whether the accused *ought* to have killed accidentally or mistakenly, but whether under the influence of drink he in fact did so.

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[49] As actually happened during a civil disturbance in Cyprus. It is to be observed here that A's intent to avoid death is strictly an ulterior intent or motive.

[50] Captain Moir, whose grounds were infested with trespassers, gave warning that he would fire at any trespasser. He did so, wounding the trespasser in the arm. The trespasser was carefully nursed by the captain but died. The captain was tried for murder, convicted and hanged. Cited in Dicey at 490.

[51] *R.* v. *Lobell*, 41 Cr.App.R. 100, dissenting from *R.* v. *Smith* (1837) 8 C. & P. 160.

[52] It is not, however, an easy defence to establish in practice, since by his words and conduct the drunken person usually indicates that he knows what he is doing. In charges of murder the test appears to be Was the accused in such a condition, due to the influence of drink, that he had not the intention, and could not form the intention of doing serious injury?

To take an example of the first type of accident, if in *Larkin's* case instead of the woman falling on the razor when in a drunken state, the accused had drunkenly fallen on the woman, and the razor had happened to cut her throat, without any intention on the part of the accused to bring the razor into contact with her throat, the verdict could be at most manslaughter. Similarly, in a case where the accused stabbed his friend, thinking him to be a theatrical dummy, he was acquitted of murder, although found guilty of manslaughter.[53]

To what extent should drunkenness avail in the case of a killing by mistake in supposed self defence? In *R.* v. *Marshall* (1 Lew 76), on an indictment for stabbing, Parke B. told the jury that they might take into their consideration among other circumstances the fact of the prisoner being drunk at the time in order to determine whether he acted under a bona fide apprehension that his person or property was about to be attacked. At the York Summer Assizes in 1831 he gave a ruling to a similar effect in the case of *R.* v. *Goodier*. The same principle was applied to a charge of murder in the modern case of *R.* v. *Letenock* (12 Cr.App.R. 221). In this case the accused was charged with murdering a corporal. The accused was drunk at the time and the corporal manifested a violent attitude towards him. He killed the corporal by stabbing him. The trial judge directed the jury that drunkenness was no defence to the charge, and he was convicted of murder. On appeal it was held that this was a misdirection, and the jury should have been directed that if, from the corporal's attitude, the accused inferred that he was going to be attacked, the jury might convict of manslaughter. The court added that there was an element of doubt as to whether or not there was anything which could have caused the accused in his drunken condition to infer that he was going to be attacked. A verdict of manslaughter was substituted.[54]

The limits of subjectivity

Before assessing the significance of *Ward's* case it remains for consideration whether the analysis so far attempted is fundamentally defective. Critics of it take as their *cheval de bataille* the oft-quoted words of Holdsworth: "We must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove *mens rea.* That, of course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence."[55] It is difficult to see the force of that criticism when the theory of *mens rea* attacked lets in such defences as accident, mistake and drunkenness. Nor is it easy to see what is meant when it is alleged that law is confused with evidence. The proposition of law involved is that all men are deemed to have a certain degree of knowledge unless they are insane. They are expected to know what acts will cause grievous bodily harm or death and are ordered at their peril to refrain from them. And how, it may be asked, could the criminal law function at all without some external standard of knowledge? Apart from such a standard the criminal law would degenerate into pure subjectivism.

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[53] *R.* v. *Donoghue*, *The Times*, January 13, 1951. Quoted by Glanville Williams, *Criminal Law*, at p. 370.

[54] See further on drunkenness and mistake an article by Glanville Williams in [1954] Crim.L.R. 740, at 754.

It is hardly worth remarking that to convict a man of murder, who did not possess the heart bent on mischief, the heart regardless of social duty would be a melancholy state of affairs. Foster, whose noble *Discourse on Homicide* did much to bring the obscure meaning of malice into true perspective, pin-pointed as the essence of the offence the *malus animus*, which was to be collected from all the circumstances of the case, and added that it was this which bringeth the offence within the denomination of wilful malicious murder. He also added, commenting on the case of the unfortunate man who had accidentally killed his wife with a pistol picked up in the street: "Where the rigour of the law bordereth on injustice mercy should, if possible, interpose in the administration of justice."[56]

It is interesting to observe, however, that Foster experienced no particular difficulty in synthesising the subjective and objective tests. In determining whether the *malus animus* was present he was content to let the act speak for itself. Three instances of this may be given. The first illustration is the case cited by Hale[57] of a carter driving a horse and cart along the highway who runs over a child causing its death. Of this case Foster says: "If he saw or had timely notice of the mischief likely to ensue and yet drove on it will be murder for it was wilfully and deliberately done. Here is the heart regardless of the social duty which I have already taken notice of."[58]

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[55] H.E.L. III, 374.

[56] Foster 264.

[57] 1 Hale 476. *Cf.* the similarity between this illustration and *Hedley's Case.*

Secondly, speaking of the difference between murder and manslaughter, he illustrates the case of a landowner using force against a trespasser. "A, finding a trespasser on his land, in the first transport of his passion, beateth him, and unluckily happeneth to kill; this hath been holden to be manslaughter. But it must be understood that he beat him not with a mischievous intention, but merely to chastise him for the trespass, and to deter him from committing the like; for if he had knocked out his brains with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel beyond the bounds of a sudden resentment whereof he had died it had been murder. For these circumstances are some of the genuine symptoms of the *mala mens*, the heart bent on mischief."[59]

Thirdly, in discussing *Rowley's* case, he observes: "If upon this provocation the father, after running three-quarters of a mile, had set his strength against the child, and had despatched him with a hedgestake or any other deadly weapon or by repeated blows with his cudgel, it must, in my opinion, have been murder, since any of these circumstances would have been a plain indication of the *malitia*, the mischievous vindictive motive before explained."[60]

If we leave aside for the moment the defence of diminished responsibility, and supposing an accused pleads that the act of killing was not intentional, what defence, it may be asked, remains open to him if he cannot plead accident, mistake, drunkenness or insanity? The only other way it would seem of rebutting that the act was intentional is to deny that he foresaw the consequences of the act, consequences which were obvious to the jury and to any other person of normal mentality. This, of course, involves the delicate question as to whether a man can be said to commit an act intentionally if although he knows what he is doing, he cannot foresee the consequences.[61] Stephen recounts the case of the idiot who cut off a man's head while he was asleep, remarking that it would be great fun to see him looking for it when he woke up.[62] It would be grotesque in such a case to suggest that the idiot intentionally caused the man's death.

It is fairly obvious that a defence consisting of a denial of foresight of those consequences which any normal man would foresee as resulting from the given act must impliedly raise an issue as to the accused's mental state, and until diminished responsibility became a defence there was no *via media* between sanity and insanity. An inability to plead mental incapacity short of insanity where an accused was not drunk and an ability to plead such incapacity through drunkenness was indeed a glaring anomaly.

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[58] Foster 263.

[59] *Ibid.*, 291, an illustration again taken from 1 Hale 473.

[60] *Ibid.*, 294.

[61] See an article by A. E. Gotlieb, "Nature and Quality of an Act." 19 M.L.R. 270

[62] H.C.L. II, 166.

There are, of course, cases where judges have been prepared to ignore the M'Naughten Rules, and, in effect, to accept a mental state short of insanity as excusing the accused from the consequences of his act. An instructive example of this was *R.* v. *Bingham*.[63] The accused was charged with the murder of an infant by hitting him. The medical evidence was to the effect that the accused knew what he was doing and that it was wrong, but he did not have sufficient reasoning power to foresee the natural consequences of such violence upon such a young child. Upon this evidence a plea of guilty to manslaughter was accepted. It is difficult to see how the medical evidence in this case was consistent, because if the accused could not foresee the consequences of his act how could he be said to know its nature and quality? The idiot in Stephen's example knew what he was doing, namely cutting off the man's head, and he probably knew that he ought not to have done it, but to suggest that he knew the nature and quality of his act is absurd.[64] Another case was *R.* v. *Lenchitsky* (*The Times*, January 12, 1954, C.C.A.). Here the accused, meeting a little girl in the street, took her to his house where he undressed her. She started to cry and, thereupon, he put his hand over her mouth and also put part of her clothing round her mouth. Then he put her into a box, and it was not then apparent whether she was alive or dead. He was charged with her murder, and it was in evidence that he was feeble-minded with the intelligence of a child of nine. Directing the jury, Havers J. said that if the accused intended either to kill the child or to cause her grievous bodily harm, then he was guilty of murder, but if, owing to his feeble-mindedness, he was incapable of forming the intention to do grievous bodily harm then he was guilty of manslaughter. He also directed the jury on the issue of insanity.

The significance of Ward's case

The first significant factor about *Ward's* case was that it expressed approval of the foresight test, as opposed to the test of intention. The basis of *mens rea* was shifted from intention to knowledge. Ward, be it noted, pleaded in his defence that he had no intention of harming the child, but the trial judge directed the minds of the jury not to what the prisoner intended but to what the prisoner as a reasonable man should have foreseen. And would it not simplify directions to juries if the test of foresight was adopted in all cases? This would surely avoid the objectionable dichotomy in the formulation of the necessary *mens rea* to which reference has been made earlier in this article.

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[63] Quoted by Glanville Williams, *Criminal Law*, 361.

[64] Glanville Williams considers that the verdict should have been one of insanity.

Secondly, in relation to the homicidal act, although the word " likely " was used once by the trial judge, as cited in the Court of Criminal Appeal, the general sense of his direction was that the act must be of such a nature as will inevitably cause death or grievous bodily harm. The word " must " was also used by Lord Goddard C.J. in his judgment.[65] It would be far better, it is suggested, that the words " probably " or " likely " are avoided altogether. It is thought in practice that juries do not pay much attention to directions based on likelihoods or probabilities, for homicidal acts are generally of such a nature as will inevitably produce death or grievous bodily harm. Strangely enough, some critics of the *Ward* case appear to have ignored what, in fact, the prisoner was, on the medical evidence, found actually to have done to the child.[66] It can scarcely be thought that the jury would have found the prisoner guilty if they had come to the conclusion that all he had done was to shake it.[67]

Thirdly, in relation to the test of foresight, the court laid down ✓ that in applying it what had to be considered in relation to the intrinsic quality of the homicidal act was not what the accused apprehended but what the average man apprehended its intrinsic quality to be. In other words it adopted, it is respectfully suggested, the analysis which has been attempted in this article. The learned counsel for Ward contended that the judge should have directed the jury to a subjective test. Since the prisoner did not plead accident, mistake or drunkenness this contention would have been relevant only if the jury were entitled to find as a fact of evidence that the prisoner's mental powers were not those of the average man. But they were not so entitled to find for they were bound by the presumption that every man is sane until the contrary is proved, and Ward did not plead insanity.

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[65] " If the act is one with regard to which the jury can find that a reasonable man would say ' It would never occur to me that death or grievous bodily harm would result,' then the jury can find the prisoner guilty of manslaughter ; but if they come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm and that the child died of that grievous bodily harm, then a verdict of murder is justified."

[66] See, *e.g.*, the statement of Mr. Prevezer [1956] Crim.L.R. 377 which evoked a criticism from Chief Inspector Byrne (note 6), *ante*. See also a similar statement by Mr. J. W. C. Turner [1958] Crim.L.R. 29.

[67] It scarcely needs saying that violence on an infant is to be distinguished from violence on a full-grown person. One blow with the hand may suffice in the case a young child. See the case of *Brown*, Hume i 238, and in the case of *Thomas Breckenbridge* (1836) 1 Swin. 153, Lord Meadowbank said that violence towards the weak and frail is doubly reprehensible, since they are entitled to be protected against violence that will injure them.

✓ The truth of the matter appears to be that where the accused does not plead accident, mistake, drunkenness or insanity, then whether the objective test, as laid down in *Ward's* case, or the subjective test is applied the result is the same. A purely subjective test can have relevance if, and only if, there are outside the penumbra of the M'Naughten Rules persons who cannot bring to bear upon acts of a homicidal nature that degree of intellectual power and judgment which is esential if the grave punishment for murder is to be justly inflicted. It is this circumscription, it is suggested, which has given rise to the criticism in *Ward's* case, for so circumscribed the purely subjective theory merely beats the air, owing to the rigid definition of legal insanity. It follows that if criticism there is to be it should be directed not to the *ratio decidendi* of *Ward's* case itself, but to the twofold division into the the average man and the insane one. And even here the criticism would have no validity unless the prisoner's mental faculties and sense of responsibility were such as to prevent him from forming a true appreciation of the serious consequences of his act. To summarise the matter, the criticism of the case amounts to no more than a contention that the Court of Criminal Appeal should have found some *via media* between the law of sanity and insanity. But the court must take the law as it finds it. Either Ward was sane or insane. Since he did not plead insanity he had perforce to be treated as possessing the brain of the average man, although, in fact, he was subnormal.

It has been said that *R.* v. *Ward* was a leading case.[68] If it was a leading case it is difficult to see what new point it decided. It certainly did not establish that negligence is a sufficient *mens rea* for the offence of murder.[69] The parallel drawn in the case was not between the reasonable man and the negligent one but between the sane and the insane one, that is between the man who is able to appreciate the nature and quality of his act and the man who is not. The only significance of the case was that it revealed an unwillingness to relax the rigidity of the M'Naughten Rules, and to apply what in fact would be a doctrine of diminished responsibility. Since diminished responsibility has now become a defence *Ward's* case has lost any significance, if significance, indeed, it had. If the accused does not plead accident, mistake, drunkenness or insanity, the only chance of escaping the objective assumption that he was a reasonable man is to plead diminished responsibility, and if that defence fails it fails because the jury has in fact found him to be a reasonable man.

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[68] See the remarks of Mr. Prevezer [1956] Crim.L.R. 383.

[69] This is suggested by Mr. Prevezer, *ibid.*, and apparently supported by Glanville Williams [1957] Crim.L.R. 293. It is suggested, with all due respect, that this appears to overlook the fact that Ward, even on his own evidence, intentionally assaulted the child, and the injuries which it sustained were the direct cause of his voluntary conduct. If it is said that he was merely negligent, because he was unable to foresee the result of his action, then he was no more negligent than any other person who,

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by defect of reason, is negligent when his conduct falls below the objective standard. The idiot in Stephen's example certainly fell short of the objective standard, and in that sense was negligent. If Ward was, through the impairment of his mental faculties, permanently deprived of the foresight of the average man then surely his plea should have been insanity, and if the offence had taken place after the passing of the Homicide Act, 1957, his plea would undoubtedly have been one of diminished responsibility.

Practice and Procedure

Central Criminal Court

Indictment—separate indictments charging manslaughter and stealing and receiving—witnesses the same for each indictment.

In R. *v.* SMITH AND OTHERS * (Central Criminal Court: Glyn-Jones J.: November 11, 25–29, December 2–10, 1957) ([1958] 1 All E.R. 475) the five defendants had been committed for trial to the Central Criminal Court on charges of stealing or receiving a lorry or the lead which was loaded on it. In addition the first two defendants were committed for trial on a charge of the manslaughter of D. It was alleged that D. received fatal injuries while assisting the first two defendants in unloading a lorry laden with stolen lead. Separate indictments had been preferred against the defendants, the first charging the first two defendants with the manslaughter of D. and the second charging all five defendants with the stealing or receiving the lorry or the lead. Apart from the medical witnesses on the charge of manslaughter the witnesses in each indictment were the same.

Held, (i) that it would be desirable in the interests of justice and in the public interest that all the matters alleged against the defendants should be heard and disposed of in one trial. It was not, however, possible to amend the indictment for manslaughter by including the other defendants, nor was it right to amend the indictment for stealing and receiving by adding the charge of manslaughter. In the circumstances a bill of indictment would be granted against all the defendants to include a charge of manslaughter against the first two defendants and the trial would proceed on the voluntary bill.

(ii) That, as all the defendants had been committed for trial for the offences with which they were now charged, the depositions of those witnesses who had been conditionally bound over could properly be read at this trial. [H. P.]

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* For the Crown: *R. E. Seaton, E. J. P. Cussen, Miss P. G. Coles* (instructed by the Director of Public Prosecutions). For Smith and Semaine: *R. A. Kaye* (instructed by R. G. Freeman & Co.). For Candler: *P. A. G. Rawlinson* (instructed by Prothero & Prothero). For E. G. Richardson: *J. C. G. Burge, D. W. T. Price* (instructed by Brian Rees & Co.). For C. W. Richardson: *Victor Durand, R. M. G. Simpson* (instructed by Brian Rees & Co.).

Summary Justice

Children

On a summons under section 11 of the Children and Young Persons Act, 1911 (as amended by section 8 of the Children and Young Persons (Amendment) Act, 1952), the parents of a nine-year-old girl were fined £2 each for exposing the child to the risk of an open grate. The child was badly burned when her dress caught alight while she was playing by the fire. The defendants pleaded guilty to the charge and stated that they were out at work when the accident happened; Douglas: Smethwick Magistrates' Court (*Birmingham Mail,* May 5).

Disturbances

Two youths were each bound over in the sum of £5 to be of good behaviour for a year when they pleaded guilty to a charge of misbehaving contrary to the provisions of the Justice of the Peace Act, 1361 ; they had climbed the 708 ft. high B.B.C. television mast at Crystal Palace; Silver: Penge Magistrates' Court (*Evening Standard,* June 3).

Highways

A summons under the Highways Act, 1835, s. 72, charging that the defendant " wilfully laid water which turned to ice upon the highway to the personal danger of persons travelling thereon," was dismissed on the ground that water was not a solid. The magistrate could not accept the argument that in putting water on the road the defendant must be deemed to have intended to put ice on the road. The prosecution was brought following a collision caused by the freezing of water pumped onto the road in the course of excavating operations which the defendant was supervising: Fergus: Huddersfield Magistrates' Court (*The Times*, May 29).

Road traffic

On a charge of causing a van to wait in a restricted street during the prescribed hours, contrary to the Central London (Waiting and Loading) (Restriction) Regulations, 1957, the driver of the van was fined £1. The defendant pleaded not guilty to the charge and contended that, as he was delivering an electric fire to a customer, he was exempted by a proviso to regulation 3, which permitted waiting for twenty minutes where he was " delivering or collecting goods or merchandise or loading or unloading the vehicle at premises situate within the street if it is not reasonably practicable to load or unload the vehicle in any neighbouring street not being a restricted street." This contention was rejected by the magistrate on the ground that the regulation envisaged that the van itself should be engaged in the operation during the permitted period. Further, a second proviso to the regulation required the driver to remain with the vehicle all the time. The magistrate also drew attention to regulation 4 and vehicles specifically exempted therein; Clerkenwell Magistrates' Court, April 18 (102 *Solicitors' Journal* 358).

Shops

On each of two summonses for carrying on a business in a place other than a shop at a time when it was unlawful to keep a shop open in Rochdale, the owner of a bus converted into a mobile shop was fined £3. The magistrates decided that for the purposes of hours of closing a mobile shop came within the provisions of the Shops Act, 1950; Stone: Rochdale Magistrates' Court (*Manchester Guardian*, June 5).

Case and Comment*

ABORTION

Manslaughter—unlawfully using an instrument to procure a miscarriage—preservation of life or health of woman

R. v. Newton and Stungo

Central Criminal Court: Ashworth J.: May 19, 1958.[1]

Jean J. F. Smith was admitted to the National Temperance Hospital on October 15, 1957. She was then very ill and agitated but apparently suffering from no mental disorder. She died on October 24, 1957, the cause of death being renal failure following upon abortion. The prosecution alleged that the deceased had been referred to Dr. Newton by Dr. Stungo for termination of pregnancy and that Dr. Newton, after giving her an inter-uterine injection of utus paste, had sent her back to her hotel without further treatment or supervision. The defence was that the mental condition of Miss Smith required the termination of her pregnancy.

On a submission Dr. Stungo was found not guilty of being an accessory before the fact to using an instrument to procure a miscarriage.

Ashworth J. directed the jury: "The law about the use of instruments to procure miscarriage is this: 'Such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman.' When I say health I mean not only her physical health but also her mental health. But although I have said that 'it is unlawful unless,' I must emphasise and add that the burden of proving that it was not used in good faith is on the Crown."

On a verdict of guilty of manslaughter by unlawfully using an instrument to procure a miscarriage and of using an instrument to procure a miscarriage, Dr. Newton was sentenced to consecutive terms of three and two years' imprisonment respectively. He was found not guilty of manslaughter by criminal negligence.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. The direction follows that laid down by Macnaghten J. in *R.* v. *Bourne* [1939] 1 K.B. 687. For a discussion of that case, see Glanville Williams, *The Sanctity of Life and the Criminal Law*, p. 151.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the Prosecution: *R. E. Seaton* and *E. J. P. Cussen* (instructed by the Director of Public Prosecutions). For Dr. Newton: *Gerald Howard Q.C.*, and *N. Brodrick* (instructed by Messrs. Le Brasseur & Oakley). For Dr. Stungo: *N. Richards Q.C.* and *C. Humphreys* (instructed by Messrs. Le Brasseur & Oakley).

CONSPIRACY

Conspiracy to defeat the course of public justice—evidence of a number of overt acts—one conspiracy only

R. v. Hammersley and Others

Court of Criminal Appeal: Lord Goddard C.J., Cassels and Diplock JJ.: *The Times*, May 13, 1958.[2]

The three appellants were convicted at the Central Criminal Court of a conspiracy to obstruct the course of public justice. They had been committed for trial upon a charge of conspiring together and with other persons unknown corruptly to solicit and obtain rewards for showing favours contrary to their duty as police officers and thereby obstructing and defeating the course of public justice contrary to the common law. The indictment upon which they had been convicted set out the statement of the offence as conspiracy to obstruct the course of justice and the particulars were that they conspired together and with other persons unknown to obstruct the course of public justice in that they should act contrary to their duty as police officers in relation to the administration of the law. The appellants appealed to the Court of Criminal Appeal on the grounds, *inter alia*, that (i) the indictment was bad because it did not follow the committal and (ii) the evidence in fact disclosed a number of separate conspiracies.

Held, dismissing the appeal as to (i), the real conspiracy was that these three men agreed to defeat public justice by not bringing persons before the courts or by warning persons of charges that were going to be brought. The indictment differed in form from the committal but this court thought that the depositions disclosed the conspiracy set out in the indictment. As to (ii), this conspiracy did, of course, involve entering into illegal agreements with other persons, but the evidence shown by a large number of overt acts, disclosed only one conspiracy, not a series of conspiracies. [H. P.]

Commentary. As is common in conspiracy cases there was no direct evidence of that agreeing together, which is the *actus reus* of the crime. The prosecution's case was that the accused's overt acts, tending to obstruct the course of public justice, were done in concert and thus pointed to a prior conspiracy. The case was one of great complexity as the acts alleged ranged over a period of eight years. The appellants argued that the evidence showed a series of separate agreements. The court's view seems to have been that while there may have been other conspiracies there was one main conspiracy: "The prosecution showed . . . that they were agreed that they would defeat public justice by not bringing persons before the courts, and that was the conspiracy: 'We won't do our duty as we ought, we won't report to our superior officers.'" (*The Times*, May 13.) But can it really be supposed (with great respect) that the accused ever actually agreed together in such vague and general terms, and without reference to any particular perversion of the course of justice?

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[2] For the appellant Hammersley: *Donald McIntyre Q.C., David Peck* (instructed by Messrs. John Hay and Chapman-Walkers, Brighton). For Heath: *Edward Clarke, Basil Hobson* (instructed by the Registrar, Court of Criminal Appeal). For Bellson: *Victor Durand Q.C., J. W. Harkess* (instructed by Cyril H. Chapman, Brighton). For the Crown: *Sir Harry Hylton-Foster Q.C., S.-G., G. Howard Q.C., A. P. Babbington* (instructed by the Director of Public Prosecutions).

The courts have from time to time expressed disapproval of the use of a count for conspiracy where the ulterior crime has been consummated. See *R.* v. *Luberg* (1927) 19 Cr.App.R. 133; *R.* v. *West* [1948] 1 K.B. 709, 720. The reason is that in a conspiracy case the accused is subject to certain disadvantages, notably that the acts of one conspirator in furtherance of the conspiracy are evidence against all. But *cf.* Glanville Williams, *The Criminal Law*, 530. In the present case the Solicitor-General is reported to have said that the conspiracy count was left alone in the indictment and not joined with other counts so as to avoid any possibility of confusion. It was chosen, not for some sinister motive to give unfair advantage to the Crown, but because it was a portrait of the case.

COURT OF CRIMINAL APPEAL

Discretion of Home Secretary in referring cases to the Court—technical irregularity in sentence

See Ex p. Kinally, p. 474, *post.*

EVIDENCE

Corroboration of accomplices—Scots law—reset

See Harris *v.* Clark, p. 476, *post.*

Larceny from British Transport Commission—statutory declarations as to preparation of parcels, not as to delivery to the Commission

R. v. Marley

Court of Criminal Appeal: Lord Goddard C.J., Cassels and Diplock JJ.: May 14, 1958.[3]

M. was convicted at quarter sessions of the larceny of a quantity of clothing. The larceny was committed by taking the articles out of the possession of the British Transport Commission so that the provisions of section 41 (3) of the Criminal Justice Act, 1948 (which allows, *inter alia,* evidence as to the dispatch of goods to be given by statutory declaration in any proceedings for an offence of stealing goods in the possession of the British Transport Commission), applied. Accordingly, statutory declarations were made by " packers " to prove the preparation of the various parcels. On appeal to the Court of Criminal Appeal:—

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[3] For the appellant: *Lewis Langdon* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. Corkney* (instructed by the Solicitor, British Transport Commission)

Held, that where evidence by statutory declaration instead of by oral evidence in court was allowed, it was most important that the exact terms of the statute should be complied with. There was a hiatus in the statutory declarations in the present case because they only dealt with the preparation of the parcels and not with the handing over to the British Transport Commission. The right thing would have been for the declarant to say that he handed the parcel, or saw it handed, to the Commission; alternatively, the person who actually handed the parcel to the Commission ought also to have made a declaration. The Commission, however, had given evidence in this case that the goods had been collected at their station. In the circumstances of this case no one could doubt that there had been no substantial miscarriage of justice, and, whilst deciding this point in the appellant's favour, the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and would dismiss the appeal. [H. P.]

FALSE PRETENCES

Obtaining a certificate of competence to drive—qualified driver taking place of examinee—forgery—obtaining driving licence with forged certificate

R. v. Potter and Another

Leicester Assizes: Paull J.: [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51.[4]

W. was a qualified driver of motor-vehicles; A. was not. A. made an appointment to take a driving test. It was then agreed between W. and A. that W. would take the test in A.'s place. W. presented himself for the test telling the examiner that he was A.

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[4] For the Crown: *J. A. Grieves* (instructed by Chapman & Goddard, Leicester). For the defendant A.: *E. M. L. Mallison* (instructed by Herbert Simpson, Son & Bennett, Leicester). For the defendant W.: *A. J. H. Morrison* (instructed by Sawday, Wright & Co., Leicester).

and signing the examiner's journal in the name of A. After W. had passed the test, W. signed the certificate of A.'s competence to drive in the name of A. and later handed the certificate to A. A. subsequently presented the certificate to the appropriate authority, together with the application form and fee, and was issued with a driving licence.

Held, (1) that W. procured the certificate to be delivered to him for the use or benefit of himself within s. 32 (1) of the Larceny Act, 1916, because, having procured it, he could do what he liked with it, and because he intended to induce a course of conduct by deceit; and that, accordingly, a count against both W. and A. for procuring the certificate by false pretences was good;

(2) that similar considerations applied to the procuring of the licence and that accordingly a count against both for procuring the licence by false pretences was good;

(3) that when W. signed the examiner's journal and the certificate he made false documents with intent to defraud, and that accordingly counts against him for forgery were good;

(4) that in presenting the forged certificate in order to obtain a licence A. uttered a forged document, and that, accordingly, a count against him for uttering was good. [D. C.]

Commentary. It is well established that the offence of obtaining by false pretences is committed only when the accused obtains the ownership in the chattel in question, and not where he merely acquires possession: *R.* v. *Kilham* (1870) L.R. 1 C.C.R. 261; *R.* v. *Ball* (1951) 35 Cr.App.R. 24. Thus, difficulties have been raised where the accused obtained a railway ticket (*R.* v. *Chapman* (1910) 4 Cr.App.R. 276) on the ground that the ticket is returned to the railway company at the end of the journey; and where a cheque is obtained, since it will, if cashed, be returned to the drawer through his bank. See Russell on *Crime*, 1078. In the cases of both cheques and railway tickets, however, convictions have been sustained. A similar result was reached in the present case notwithstanding that the certificate was returned to the motor taxation office. It is submitted that all these cases are in accordance with principle. If an ordinary purchaser of a railway ticket or drawee of a cheque were to burn the ticket or cheque would anyone have a ground for legal complaint? Surely not. If this is right then it seems clear that the purchaser or drawee is owner of the thing in question. So in the present case Paull J. said " there would be nothing against William Potter, having obtained that certificate, putting it on the fire."

It is clear law that a man may be convicted of larceny where he takes a thing from its owner with intent to sell it back to the same owner. It seems that the " intent permanently to deprive " of section 1 of the Larceny Act is satisfied if the accused intends that owner shall only have the benefits of ownership back by paying for them: *R.* v. *Hall* (1848) 1 Den. 381. Similarly, the railway " buys back " the ticket by giving a ride, the drawer of the cheque " buys it back" by (through his bank) paying cash—and taxation officers, the certificate of competence by issuing a driving licence.

Mr. J. W. C. Turner maintains that the proper meaning of defraud is "to cause economic loss to some person by means of deceit," Kenny, *Outlines of Criminal Law* (17th ed.), 349; Russell on *Crime*, 1476; but the cases establish that it is enough "by deceit to induce a man to act to his injury," as where the Benchers of the Inner Temple were deceived into admitting as a student a man whom it was their duty to exclude: *R.* v. *Bassey* (1931) 22 Cr.App.R. 160. In the present case the county council were induced to issue a licence contrary to their duty; and, as Paull J. pointed out, they had, in any event, parted with a chattel—a piece of paper; and this was of some economic value.

FORGERY

Forged certificate of competence to drive—qualified driver taking place of examinee at driving test—intent to defraud

See R. *v.* POTTER AND ANOTHER, p. 472, *ante*.

MANDAMUS

Technical irregularity in sentence—reference to Court of Criminal Appeal refused—discretion of Home Secretary

Ex parte Kinally

Queen's Bench Division: Lord Goddard C.J., Cassels and Diplock JJ.: *The Times*, May 14, 1958.[5]

In 1953 K. was convicted at Worcester Quarter Sessions and sentenced to nine years' preventive detention. He appealed, unsuccessfully, against his conviction and sentence. Subsequently K. became aware of an irregularity in his sentence: he alleged that his sentence was illegal because he had never been given a copy of the Prison Commissioners' report, as required by the Criminal Justice Act, 1948. K. petitioned the Home Secretary on numerous occasions to refer his case to the Court of Criminal Appeal under section 19 of the Criminal Appeal Act, 1907. The Home Secretary refused to accede to K.'s petition. On an application to the Divisional Court for leave to move for an order of mandamus to compel the Home Secretary to refer K.'s case to the Court of Criminal Appeal:

Held, that the Home Secretary had a discretion whether to exercise his prerogative to refer a matter to the Court of Criminal

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[5] For the applicant: *M. A. B. King-Hamilton Q.C.* and *Jeremy Hutchinson* (instructed by Edward F. Iwi).

Appeal; and that if he decided not to make a reference the court would not compel him to do so. [D. C.]

Commentary. This case confirms that the Home Secretary has an absolute discretion as to whether he should refer a case to the Court of Criminal Appeal under section 19. That section, therefore, does not afford an effective remedy to a man who has been wrongly convicted and has not appealed or whose appeal has been dismissed. In the present case, where the accused's complaint was of a technical nature, no great harm seems to have been done; but an unrepresented defendant whose conviction was wrong in substance and who, through ignorance, had omitted to take the point at the trial or on appeal, would have been in no better position. The same is true where fresh evidence comes to light which establishes the accused's innocence, or where a subsequent case shows that he was convicted on a wrong view of the law. See Glanville Williams, *The Proof of Guilt* (2nd ed.), 124 *et seq.* and [1957] Crim.L.R. 59 and 135.

MANSLAUGHTER

Abortion—unlawfully using an instrument to procure a miscarriage —preservation of life or health of woman

See R. *v.* NEWTON AND STUNGO, p. 469, *ante*.

MURDER

Two murders charged in single indictment — evidence of second death admissible in trial on first count and vice versa

R. v. Wilson

Court of Criminal Appeal: Lord Goddard C.J., Devlin and Diplock JJ.: *The Times*, May 20, 1958.[6]

W., a woman of nearly 70 years of age, was tried and convicted at assizes of capital murder. The case against W. was that she had murdered her second husband (whom she married in September, 1956) by administering poison to him and that she had murdered her third husband (whom she married in October, 1957) in the same way. In each case the deceased had died within a fortnight and in each case traces of phosphorus had been found in the body. W. appealed to the Court of Criminal Appeal on the ground, *inter alia,* that the learned judge ought to have tried the cases separately.

Held, dismissing the appeal, that the trial judge had said that he would have tried the cases separately except for the fact that, in his opinion, the evidence of the second death was admissible on the trial of the first and vice versa. This court could find no reason to differ from that opinion. In each case the men had died about a fortnight after marriage to W., who stood to benefit by their deaths, and in each case the body had been found to contain traces of phosphorus poisoning. Therefore, in accordance with the authorities it was perfectly material for the prosecution to give evidence that both these men had died under the same circumstances, they being the husbands and being looked after in their last illness by W. Accordingly the appeal would be dismissed.

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[6] For the appellant: *Rose Heilbron Q.C.*, *W. R. Steer* (instructed by Messrs. Thomas Magnay, Gateshead). For the Crown: *Geoffrey De P. Veale Q.C.*, *R. Withers-Payne* (instructed by the Director of Public Prosecutions).

[H. P.]

Commentary. Before the Homicide Act, 1957, it was a rule of practice, where a person was charged with more than one murder, to prefer a separate indictment in respect of each charge: *R.* v. *Davis* (1936) 26 Cr.App.R. 95. The Act, by section 6 (2), provides that "no rule of practice shall prevent [two or more] murders being charged in the same indictment or (unless separate trials are desirable in the interests of justice) prevent them being tried together." Under section 5 (3) of the Indictments Act, 1915, the court may order a separate trial of any count when the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment. When the evidence on one count would be admissible on another, it will usually be proper to try the two together. *Cf. R.* v. *Hall* (1951) 35 Cr.App.R. 167. This was the position in the present case under the rules relating to "similar fact" evidence. *Cf. R.* v. *Smith* (1915) 11 Cr.App.R. 229.

Murder by poisoning is not capital murder but, by section 6 (1) of the Homicide Act, 1957, the death penalty is retained for repeated murders.

RECEIVING

Scots law—reset—evidence—corroboration of accomplices

Harris v. Clark

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell: 1958 S.L.T. (Court of Session) 105.[7]

H., who was the son-in-law of the proprietor of a shop, was charged with having received certain articles, all of which had been stolen from a warehouse over a period of one year. In evidence, three youths, employed in the warehouse, each deposed to separate conversations with H., in which H. had urged or acquiesced in the theft, by the particular youth with whom H. had been having a conversation, of articles from the warehouse. Each youth, following upon his conversation with H., stole certain articles and delivered them to H. Upon that evidence H. was convicted.

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[7] For the appellant: *Reith Q.C.* and *Dick* (instructed by Mackay & Young, W.S.). For the Crown: *Skae, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Held, that the time and circumstances of each alleged act of receiving, although deposed to by only one witness, were sufficient to afford corroboration. Accordingly, the conviction was good.

[D. C.]

Commentary. The crime charged appears to have been " reset," the Scottish equivalent of receiving stolen goods. " The crime of reset consists in knowingly receiving and feloniously retaining articles taken by theft, stouthrief, robbery, breach of trust and embezzlement, or falsehood, fraud and wilful imposition ": T. B. Smith, *The British Commonwealth, Laws and Constitutions*, Vol I, 749.

It is a general rule of Scots (unlike English) law that the material elements in the prosecutor's case, identifying the accused as the perpetrator of the crime, must be established by the testimony of *two* credible witnesses; though " It is sometimes said that legal proof may be supplied either by two witnesses to the material facts or by one witness supported by facts and circumstances ": T. B. Smith, *op. cit.*, 778. In the particular circumstances of this case English law, too, would have required corroboration, as each of the witnesses was an accomplice.

The rule of Scots law, according to T. B. Smith (*op. cit.*, 778), " is relaxed where a series of similar crimes, inter-related by character circumstances and time, justify the inference that the panel [the accused] pursued a course of criminal conduct. In such cases the testimony of a single credible witness to each crime in the series may be accepted as mutual corroboration of the course of criminal conduct, *Moorov*, 1930 S.L.T. 596; and *Burgh*, 1944 S.L.T. 297."

Whether the youths would have been held to corroborate one another in English law would depend, it seems, on whether the fact that there had been a series of cases was held relevant to prove (*a*) that each witness was speaking the truth or (*b*) that the accused was guilty of each of the crimes. Only if it were relevant to prove (*b*) would it amount to corroboration: see *R.* v. *Sands* [1958] Crim.L.R. 256 and commentary thereon.

ROAD TRAFFIC

Exceeding speed limit—measured distance test—defendant closing on car known to be exceeding limit—insufficiency of evidence

Houston v. Leslie

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell: 1958 S.L.T. (Court of Session) 109.[8]

L. was charged with driving a motor-vehicle in a built-up area at a speed exceeding 30 m.p.h., contrary to section 1 of the Road

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[8] For the Crown: *Skae. A.-D.* (instructed by Lionel I. Gordon, Crown Agent). For the respondent: *Fairbairn* (instructed by Fairbairn & Thompson, S.S.C.).

Traffic Act, 1934. The Sheriff-Substitute found that a vehicle which had been driven in front of L.'s vehicle had passed through a measured distance in the built-up area at 44 m.p.h.; that a police officer standing at the entry of the measured distance had estimated that L.'s vehicle was 50 yards behind the leading vehicle at the entry; that another officer standing at the exit from the distance had estimated that L.'s vehicle was 20 yards behind the leading vehicle at the exit; and that both officers had formed the opinion that L.'s vehicle was closing on the leading vehicle as the two vehicles passed through the distance. The Sheriff-Substitute found the charge not proven.

Held, on appeal, that there was a sufficient doubt to justify the verdict. Some of the links in the chain of evidence were by no means clear or precise. The two estimates at the entry to, and the exit from, the measured distance were separate estimates by single witnesses and an error in one would have completely upset the calculation. [D. C.]

Trailer—" heavy duty car ambulance "—whether or not a " trailer " —Motor Vehicles (Construction and Use) Regulations

Wilkinson v. Barrett

Queen's Bench Division: Lord Goddard C.J., Hilbery and Donovan JJ.: *The Times*, April 30, 1958.[9]

W., a garage proprietor, was instructed to tow away a damaged car from the scene of an accident. He took with him a towing implement, commonly known as a " heavy duty car ambulance " or " mobile car jack." This implement consisted of a long tow bar with two wheels on a short axle at right angles to the tow bar. Informations were laid against W. alleging that he was using a " trailer " (a) in contravention of regulation 58 of the Motor Vehicles (Construction and Use) Regulations, 1955, in that the " trailer " was not provided with mudguards, and (b) in contravention of regulation 9, in that it was not equipped with sufficient and suitable springs between each wheel and the frame of the trailer. W. was convicted; and his conviction was upheld on appeal to quarter sessions. On appeal to the Divisional Court, by way of case stated:

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[9] For the appellant: *Geoffrey Lane* (instructed by Henry Glover & Co. for Anthony Clark, Lincoln). For the prosecutor: *David Owen Thomas* (instructed by F. N. James).

Held, dismissing the appeal, that the conviction was right in law and must stand. [D. C.]

Commentary. According to counsel for the appellant, there are 10,000 of this type of implement in use and they are used by the Metropolitan Police. But the only issue was whether this was a trailer and once it was settled that it was, it clearly contravened the regulation. In *Garner* v. *Burr* [1951] 1 K.B. 31 an empty poultry shed fitted with iron bogie wheels, being drawn along the highway by a tractor for sale at a market, was held to be a trailer, and the Lord Chief Justice said that the Act was " aimed at anything which will run on wheels which is being drawn by a tractor or another motor-vehicle." The device in the present case clearly fell within this definition. There seems to be a strong case for a modification of the law with respect to implements of this kind.

Motor Vehicles (Construction and Use) Regulations — weight of lorry—no evidence as to accuracy of weigh-bridge

Grierson v. Clark

High Court of Justiciary: Lord Justice-Clerk (Thompson), Lords Mackintosh and Blades: 1958 S.L.T. (Court of Session) 112.[10]

G. was charged with causing and permitting the use on a public road of a motor-lorry " the two rear wheels of which in line transversely transmitted to the surface of the road a weight exceeding nine tons " ; and B. was charged with using the vehicle in that condition, contrary to regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The Sheriff-Substitute found that the rear axle of the lorry had been weighed on a weighbridge and that it had been found to weigh 10 tons. He convicted both the defendants. On appeal:

Held, that in the absence of evidence to show that the weighbridge was accurate, the convictions must be quashed. [D. C.]

Commentary. It is thought that the evidence, in English law, would have been sufficient to sustain a conviction. *Cf. Nicholas* v. *Penny* [1950] 2 K.B. 466, where a Divisional Court held that the accused might be properly convicted of exceeding the speed limit although there was the evidence of only one police officer as to the reading on a speedometer and no admissible evidence as to the accuracy of the instrument. The recording on the instrument is prima facie evidence on which the court may act. If the accused produces evidence to contradict the instrument—or even if he does not—the court may, of course, find that the prosecution's case is not proved. The English rule seems to be a reasonable one and is in accordance with the general principle of *omnia praesumuntur rite esse acta.* The Scots rule appears to be the same as that in *Melhuish* v. *Morris* [1938] 4 All E.R. 98, which was, in effect, overruled in *Nicholas* v. *Penny.*

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[10] For the appellants: *Morison* (instructed by Dan McKay & Norwell, S.S.C.). For the Crown: *Lord Advocate* (*Milligan Q.C.*), *Gillies, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Taking and driving away a motor-car without the owner's consent —immaterial that car taken from owner by someone other than defendant

R. v. Richardson

Court of Criminal Appeal: Lord Goddard C.J., Devlin and Diplock JJ.: May 19, 1958.[11]

R. was convicted at quarter sessions, *inter alia*, of taking and driving away a motor-car without the consent of the owner. R. had been stopped by the police when in the car with two other men. According to the police R. had said: " We did not nick it; we got it from another bloke." On appeal to the Court of Criminal Appeal (by certificate):

Held, dismissing the appeal, that there was evidence at the trial that this motor-car had been taken away from the owner's house or from the street without his consent and that twenty-four hours later these three men had been found driving it. All three men knew, as the jury found, that the car was being driven without the owner's consent and it did not matter for the purposes of this offence whether R. or one of the other men had taken it or whether they took it from some friend. Accordingly the appeal would be dismissed. [H. P.]

Commentary. Under section 28 (1) of the Road Traffic Act, 1930, it is an offence, punishable either on summary conviction or indictment, to " take and drive away " a motor-vehicle without the consent of the owner. This offence differs from larceny in the important respect that it is not necessary to show that there was an intent " permanently to deprive the owner "; and it is committed where the vehicle is taken for a drive with the intention of abandoning it.

It appears to have been held that R., if he was not the actual taker of the car, was at least an accomplice of the taker. If he had been a mere receiver of the taken car, it is not easy to see that he could have been convicted. In *Mowe* v. *Perraton* [1952] 1 All E.R. 423 it was held that a servant who had custody of a van was not guilty of the offence when he drove the van to his home instead of to the garage, as his employers required. His act would, of course, have been a "taking" for the purposes of common law larceny (and under section 17 (1) of the Larceny Act, 1916) but the Divisional Court did not accept the prosecution's argument that the same meaning should be given to section 28 (1). Thus, it seems that "takes" has a narrower meaning in the Road Traffic Act than in the Larceny Act. Therefore, since receiving is not "taking" under the Larceny Act, it would seem to follow, *a fortiori*, that it should not be under the Road Traffic Act. See also *Shimmel* v. *Fisher* [1951] 2 All E.R. 672.

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[11] For the appellant: *John Booth* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. D. L. Du Cann* (instructed by the Solicitor, Metropolitan Police).

It has been suggested that a receiver of a vehicle, wrongfully taken under section 28 (1), might be guilty of receiving property "knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour" under section 33 of the Larceny Act, 1916. It seems clear that this section (unlike its predecessors, sections 91 and 95 of the Larceny Act, 1861) is *not* confined to cases where the taking was a crime at common law or under the Act in question (*cf.* Russell on *Crime*, 1333), so the suggestion seems, with respect, valid. In *R.* v. *New* [1957] Crim.L.R. 474 a conviction for receiving goods obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, was upheld. See also *R.* v. *Kutas* (1923) 17 Cr.App.R. 179. It is, of course, arguable that "obtain" in section 33 means "obtains the property in" and that the section does not apply to cases where possession only was obtained in circumstances not amounting to stealing.

SCOTLAND

Reset—evidence—corroboration of accomplices

See HARRIS *v.* CLARK, p. 476, *ante.*

SEXUAL OFFENCES

Indecent assault—unlawful sexual intercourse with girl under sixteen—plea of guilty—consenting party

R. v. Muff

Court of Criminal Appeal: Lord Goddard C.J., Devlin and Diplock JJ.: *The Times*, May 20, 1958.[12]

M. had been charged at the Central Criminal Court with indecent assault and with unlawful sexual intercourse with a girl under sixteen. Having at first pleaded not guilty to both counts, M. changed his plea and pleaded guilty to having unlawful sexual intercourse. For this offence M. was sentenced to two years' imprisonment. On appeal to the Court of Criminal Appeal against sentence:

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[12] For the appellant: *R. Batt* (instructed by The Registrar, Court of Criminal Appeal). For the Crown: *Gilbert Rountree* (instructed by the Solicitor, Metropolitan Police).

Held, that the case having been dealt with on the plea of guilty, this was clearly on the basis that the girl was a consenting party. It seemed that the trial judge had been dealing with the case on the basis that the offence was really rape. If the girl was a consenting party, the appropriate sentence was a nominal one, because the offence had been committed three days before the girl attained the age of sixteen. The sentence of two years' imprisonment would, therefore, be set aside and a sentence substituted which would permit M.'s immediate release. [H. P.]

Commentary. As the girl was only three days under sixteen and the case had to be treated as if she were a consenting party, it had to be assumed that there would have been no offence if she had been just three days older.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by Henry Palmer, *Barrister-at-Law*

Imprisonment

In R. v. Booth, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: April 21, 1958) reduced a sentence of four years' imprisonment to one of three years' imprisonment. B. had pleaded guilty at assizes to receiving. B., who was a man of thirty-nine years of age, had no previous convictions, other than motoring offences. B. was the manager of the shop where the goods, which were radio and television sets and the like, were stolen. The value of the articles was about £400. The court stated that there was only one circumstance which had induced them to modify the sentence, namely, that the trial judge had taken the view that B. had been the receiver for a particular gang (which had been tried at the same assizes). That evidently meant he was acting as an habitual receiver for those people. Counsel for the prosecution had opened this matter but the police officer who was called was not asked about it. It seemed, therefore, that the trial judge had taken something into consideration of which there was no evidence and, in the circumstances, the sentence would be reduced to one of three years' imprisonment.

In R. *v.* PAYNE, the court (Donovan, Havers and Paull JJ.: May 19, 1958) reduced a sentence of five years' imprisonment to one of twelve months' imprisonment. P. had been convicted at quarter sessions of assaulting his wife thereby occasioning her actual bodily harm. The evidence called by the prosecution at the trial showed that P., who was separated from his wife, had arranged to meet her with a view to effecting a reconciliation. During the course of the meeting P. had cut his wife with a knife or razor blade and had tried to strangle her; but the medical evidence did not support that suggestion. P., who was a man of thirty-eight years of age, had many previous convictions for larceny, etc., but none for violence, and had not been in trouble since 1954. The court stated that, as P. had been charged with an assault occasioning actual bodily harm rather than an attempt to strangle or wounding with intent or causing grievous bodily harm, and giving due weight to the medical evidence, this did not seem to be a case for the maximum penalty. Accordingly, the sentence would be reduced to one of twelve months' imprisonment.

Preventive detention

In R. *v.* PHELAN, the court (Lord Goddard C.J., Cassels and Diplock JJ.: May 14, 1958) reduced a sentence of seven years' preventive detention to one of four years' imprisonment. P. had pleaded guilty at a Crown Court to storebreaking and larceny. P., who was a man of thirty years of age, had eight previous convictions. P.'s last conviction was in 1954 and he had worked reasonably well as a labourer and in a circus since his release from prison in 1955. The court stated that, taking into account that it was four years since P.'s last conviction and three years since his release, the appropriate sentence was one of four years' imprisonment.

In R. *v.* EVANS, the court (Donovan, Havers and Paull JJ.: May 19, 1958) reduced a sentence of eight years' preventive detention to one of five years' imprisonment. E. had been convicted at quarter sessions of housebreaking and larceny. E. had broken into a public house and stolen £66 in money from the tills. E., who was a man of fifty-eight years of age, had seventeen previous convictions between 1924 and 1950. Since 1950 his only conviction for an offence of dishonesty was in 1955 when he was placed on probation for larceny in a dwelling-house. The court stated that, giving due weight to the fact that E.'s one offence of dishonesty since 1950 was in 1955, and that there was positive evidence that he had responded to probation and had earned an honest living for two and a half years, the appropriate sentence was a long sentence of imprisonment rather than preventive detention. Accordingly, the sentence would be reduced to one of five years' imprisonment.

In R. *v.* MURPHY, the court (Donovan, Havers and Paull JJ.: May 19, 1958) reduced a sentence of seven years' preventive detention to one of four years' imprisonment. M. had pleaded guilty at quarter sessions to shopbreaking, one other offence being taken into consideration. The offence was breaking the glass door of an off-licence and stealing three bottles of vermouth. The offence taken into consideration was one of stealing £29 worth of clothing and cash in a house. M., who was a man of thirty-five years of age, had sixteen previous convictions commencing in 1938. He had had numerous short sentences, but in 1949 he had been sentenced to twelve months for shopbreaking, in 1954 fifteen months for fraud, assault and robbery, and in 1957 fifteen months for robbery. The court stated that it was open to doubt whether, in all the circumtances, the time had come for preventive detention and, accordingly, the sentence would be reduced to one of four years' imprisonment.

Corrective training

In R. *v.* WASLEY, the court (Cassels, Gorman and Glyn-Jones JJ.: April 21, 1958) reduced a sentence of three years' corrective training to one of fifteen months' imprisonment. W. had been convicted at a Crown Court of stealing some floor tiles worth £3 and some wall tiles worth 8s. W., who was a man of twenty-five years of age, had seven previous convictions. He had been placed on probation twice for stealing, when he was eleven and sixteen years old respectively. He was again placed on probation in 1950 for disorderly behaviour and was fined later the same year for an assault on the police. In 1956 he was placed on probation for larceny from a dwelling-house and was fined twice during the currency of the order, in July, 1956, for larceny and in February, 1957, for receiving. The probation officer said that he needed discipline. The court stated that, having regard to the very small value attached to the articles which were stolen and to the fact that W. had been on probation a number of times without much good result, a sentence of imprisonment would be the appropriate punishment. Accordingly, a sentence of fifteen months' imprisonment would be substituted for the sentence of corrective training.

In R. *v.* HOYLE, the court (Lord Goddard C.J., Cassels and Diplock JJ.: May 5, 1958), altered a sentence of five years' imprisonment to one of four years' corrective training. H. had been convicted at quarter sessions of shopbreaking and officebreaking and, six other offences being taken into consideration, had been sentenced to two years' imprisonment. The day before that trial H., who was on bail, and four other young men, took a motor-car that did not belong to them and committed two offences of shopbreaking and officebreaking. To these three offences, H. had pleaded guilty at the same quarter sessions and, three other offences committed whilst on bail being taken into consideration, had been sentenced to five years' imprisonment to run concurrently with his sentence of two years. H., who was a man of twenty-four years of age, had one previous conviction in 1957, when he was fined for stealing a bicycle. The Prison Commissioners recommended corrective training. The court stated that this was just the case in which corrective training should be given and, accordingly, the sentence would be altered to one of four years' corrective training.

Borstal training

In R. *v*. BIGGINTON, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: April 21, 1958) altered a sentence of Borstal training to a fine of £25. B. had pleaded guilty, with two others, at quarter sessions to attempted shopbreaking. B., who was a young man of nineteen years of age, had five previous convictions and findings of guilt. After having been twice discharged under the Probation of Offenders Act for stealing from an unattended car, and storebreaking and larceny when he was eight and nine years old respectively, he was sent to an approved school for officebreaking (seven other offences taken into consideration) when he was nine years old. In 1954 B. had been sentenced to three months' detention in a remand home. Apart from an offence in 1956, not of dishonesty, for which he was given a conditional discharge, he had not been in trouble since 1954, and had been working as a miner earning £15 per week. The probation officer gave evidence that B. was very co-operative and had worked reasonably well as a miner. The court stated that they were inclined to give B. one more chance. They were not satisfied that this was a case for Borstal and would fine B. £25.

In R. *v*. PRETTY, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: April 21, 1958) substituted sentences totalling six months' imprisonment for a sentence of Borstal training. P. had pleaded guilty at a magistrates' court to taking and driving away a motor-car without the consent of the owner, to driving whilst uninsured and to driving without a licence; P. had driven the car concerned in the charges into a tree, doing about £90 worth of damage. P., who was a young man of twenty-one years of age (having attained that age on April 4, 1958), had previously been fined in 1957 for assault on a police officer. He had been placed on probation in August, 1957, for the present offence; but, having failed to report to the probation officer or to notify his address, was taken back to the magistrates' court and committed for sentence under section 28 of the Magistrates Courts Act, 1952. The court stated that they did not think it desirable to send P. to Borstal as he was now twenty-one years of age. The sentence of the court would be three months' imprisonment for taking and driving away the motor-car, three months' imprisonment, consecutive with the first sentence, for driving whilst uninsured, and a fine of 1s. for driving without a licence.

[NOTE: The appellant having been committed for sentence under section 28 of the Act of 1952, the sentences of imprisonment were limited to the maximum which could have been imposed by the magistrates: see section 20 (5) of the Criminal Justice Act, 1948.]

Conditional discharge

In R. *v.* RACKSTRAW, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: April 21, 1958) substituted a conditional discharge for a sentence of Borstal training. R. had pleaded guilty at quarter sessions to shopbreaking and larceny. R., who was a young man of seventeen years of age, had three previous convictions. In April, 1957, he had been fined and disqualified for motoring offences and in September, 1957, he was again fined for motoring offences and placed on probation for driving whilst disqualified. In January, 1958, R. was convicted of attempting to obtain £16 by false pretences and sent to a detention centre for four months. The present offence had been committed before the offence for which R. was convicted in January, 1958. The court stated that, if R. had told the court which had sentenced him to the detention centre about the shopbreaking and larceny, they would probably have taken that offence into consideration. It was while he was at the detention centre that he was brought up for the present offence. The court had a good report on him. He apparently did well at the detention centre. In the circumstances, a conditional discharge was appropriate.

Acts and Orders [*]

Aliens

Gatwick is now an approved port for the purposes of the Aliens Order, 1953 (S.I. No. 1671). The Order of 1956 (S.I. No. 330) under which Gatwick ceased to be an approved port for these purposes is revoked. Operative May 26, 1958. ALIENS (APPROVED PORTS) ORDER, 1958 (S.I. No. 820).

Animals

The requirements for the issue of a Beef Bull Licence are modified, and alternative requirements are introduced for the issue of a Dairy Bull Licence. The Regulations of 1956 (S.I. No. 1427) are amended. Operative May 12, 1958. LICENSING OF BULLS (ENGLAND AND WALES) AMENDMENT REGULATIONS, 1958 (S.I. No. 744).

Dangerous Drugs

Certain drugs are removed from and certain drugs are brought within the scope of the provisions of the Dangerous Drugs Act, 1951.

The drugs specified in the Schedule to the first of the below-named Orders are removed from the scope of the provisions of section 11 (1) of the Act. The drugs specified in the Schedule to the second of the Orders named below are brought within the provisions of Part III of the Act, which provides that it shall not be lawful to import or export any drug to which that part applies except under licence, and empowers the Secretary of State to make regulations for the purpose of preventing the improper use of such drugs. Both Orders are operative June 1, 1958. DANGEROUS DRUGS ACT, 1951 (APPLICATION) and (REVOCATION) ORDERS, 1958; S.I. Nos. 767 and 768.

For penalties for contraventions, see section 15 of the Dangerous Drugs Act, 1951.

Factories

Factory walls or ceilings painted with emulsion paint are exempted from certain provisions of the Factories Act, 1937, in the same manner as walls and ceilings painted with a washable water paint. The Factories Act, 1937, s. 1 (*c*), imposes requirements for the periodical washing and repainting of internal walls, ceilings, etc., in all rooms, passages and staircases in factories, but provides for exemption by order in cases where such washing or repainting appears not to be necessary for keeping a factory in a clean state. The Order of 1938 (S.R. & O., 1938, No. 487), as amended, grants such exemption where walls and ceilings have been painted with a washable water paint which is renewed and washed at specified intervals, provided that the dates of painting and washing and a maker's certificate of the quality of the paint are filed in the general register of the factory. A similar exemption is now granted where emulsion paint has been used. Operative June 16, 1958. FACTORIES (CLEANLINESS OF WALLS AND CEILINGS) ORDER, 1958.

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

Food and Drugs

Cocktails

Under the provisions of article 8 (*d*) of the Labelling of Food Order, 1953, no liquor may be labelled as a cocktail or mixture containing spirits unless it contains not less than 40 per cent. proof spirit. That provision is now removed, and article 8 (*d*) is revoked. Operative in England and Wales and in Scotland, May 3, 1958. LABELLING OF FOOD (AMENDMENT) and (AMENDMENT) (SCOTLAND) REGULATIONS, 1958 (S.I. Nos. 717 and 719).

Milk

The maximum price of milk on sale in Great Britain and Northern Ireland is reduced by ½d. per pint for the months of May to September inclusive in any year. The Milk (Great Britain) and Milk (Northern Ireland) Orders, 1954 (S.I. Nos. 385 and 386) as amended are re-enacted in consolidated form. Both Orders operative May 1, 1958. MILK (GREAT BRITAIN) and MILK (NORTHERN IRELAND) ORDERS, 1958 (S.I. Nos. 708 and 709).

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 754 (Finsbury); 860 (Fulham).

Magistrates

The following Order has been made altering petty sessional divisions: S.I. No. 848 (Lancashire).

Pests

Certain restrictions on the importation of potatoes into England and Wales are modified during the month of May, 1958. The restrictions imposed by the Importation of Plants Order, 1955 (S.I. No. 81) on the importation of maincrop potatoes into England and Wales are modified in respect of such potatoes grown in 1957 north of the latitude 53° N. in the provinces of Schleswig-Holstein and Lower Saxony of the Federal Republic of Germany during the period beginning on April 30, 1958, and ending on May 31, 1958. IMPORTATION OF POTATOES FROM GERMANY ORDER, 1958 (S.I. No. 704).

The Order, which permitted the importation into England and Wales of new potatoes from Spain and Portugal, until May 20, 1958, is amended to permit the importation from those countries until May 31, 1958. For the principal Order, see [1958] Crim.L.R. 337; operative May 21, 1958. IMPORTATION OF NEW POTATOES AND RAW VEGETABLES (AMENDMENT) ORDER, 1958 (S.I. No. 843).

Road Traffic

Lighting

Amber coloured reflectors on the pedals of bicycles and tricycles are now permitted, and sections 2 and 5 of the Road Transport Lighting Act, 1957 (5 & 6 Eliz. 2, c. 51), are amended accordingly. Operative May 30, 1958. ROAD TRANSPORT LIGHTING (AMENDMENT) ACT, 1958 (6 & 7 Eliz. 2, c. 22).

The Road Vehicles Lighting Regulations, 1954 (S.I. No. 1105) are amended, the principal changes being: (1) the requirements as to the minimum height from the ground at which front lamps must be fixed on mechanically propelled vehicles first registered under the Vehicles (Excise) Act, 1949, after January 1, 1952, are varied by reducing that height from 2 feet 2 inches to 2 feet; (2) obligatory rear lamps and reflectors carried on vehicles first registered under the said Act of 1949 on or after April 1, 1959, or on vehicles, not subject to registration, which are supplied by their manufacturers after that date are required to be marked with the appropriate specification number of the British Standards Institution and with certain other specified particulars. Obligatory reflectors carried on other vehicles are required to be similarly marked after October 1, 1967; (3) obligatory rear lamps and reflectors are, in the case of certain goods vehicles, to be attached to their loads instead of to the vehicles. The principal Regulations of 1954 are amended accordingly, and certain minor consequential amendments are made to the Road Vehicles Lighting (Special Exemption and Amendment) Regulations, 1954 (S.I. No. 1281). Operative June 2, 1958. ROAD VEHICLES LIGHTING (AMENDMENT) REGULATIONS, 1958 (S.I. No. 819).

For penalties for contraventions, see section 12 of the Road Transport Lighting Act, 1957.

Special types

The restrictions on the use on roads of movable plant or equipment specially designed or constructed for moving excavated material are modified. In addition to the use permitted under the provisions of article 12 of the principal Order of 1955 (S.I. No. 1038), as amended, such plant may be used on roads between private premises and ports in either direction. The maximum weights permissible are also increased provided that in some cases a notice with an indemnity is given to the relevant highway and bridge authorities. The Order of 1955 is amended accordingly. Operative June 1, 1958. MOTOR VEHICLES (AUTHORISATION OF SPECIAL TYPES) ORDER, 1958 (S.I. No. 828).

Weights and Measures

Limits of error

The limits of error to be tolerated in weights in use for trade on inspection, verification or reverification are amended, the principal changes being: (1) the amounts of error both in excess and in deficiency to be tolerated on inspection of a weight are the same, whereas hitherto the amount of error in deficiency has been half that in excess; (2) the amounts of error to be tolerated on verification are varied for both imperial and metric weights, and tolerances are prescribed for metric carat weights. The principal Regulations of 1907 are amended. Operative June 1, 1958. WEIGHTS AND MEASURES (AMENDMENT NO. 6) REGULATIONS, 1958 (S.I. No. 773).

Local standards

In relation to local standards verified or reverified after this Order comes into force, the amounts of error to be tolerated in excess and in deficiency are varied for both imperial and metric weights. In addition, tolerances are prescribed for metric carat weights. The Order in Council dated December 21, 1907 (S.R. & O. 1907, No. 1017) is amended accordingly. Operative June 1, 1958. WEIGHTS AND MEASURES (LOCAL STANDARD TOLERANCES) (AMENDMENT) ORDER, 1958 (S.I. No. 770).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

46. *Larceny Act*, 1916, *s.* 39 (2).

An English uniformed patrol officer, aware that there had been a shopbreaking over the border in Scotland, and that a particular brand of tobacco and cigarettes had been stolen, stopped three suspicious-looking Irish labourers on the road some seven miles from the Scottish border. The men were searched and it was found that one was in possession of the same brand of tobacco as that stolen in Scotland, and the other two were in possession of a brand of cigarettes—" Passing Cloud "—which would not normally be found in the possession of this type of person. As the Larceny Act, 1916, s. 39 (2), gives authority for a person found in possession of property stolen in one part of the United Kingdom to be dealt with, indicted, tried and punished in any other part of the United Kingdom in the same manner as if the property had been stolen in that part, I would value your opinion as to whether the officer has power of arrest in this case, and do the words " dealt with " in section 39 (2) imply that such a person can be arrested or summoned, or a warrant issued, and be brought to court.

Section 49 of the Larceny Act, 1916, does say that the Act shall not apply to Scotland " except as hereinbefore provided " and the use of the words " United Kingdom " in section 39 would appear to include Scotland.

Whilst it is appreciated that the common law of England gives a police officer power of arrest on suspicion of felony, could a case of this kind be included? If the officer concerned had not been in prior possession of information about the shopbreaking in Scotland. would you agree that he can arrest under common law, pending inquiries?

Whilst it is accepted that an arrest in England for a Scottish offence, and vice versa in Scotland for an English offence, should be made by an officer in possession of a warrant, would there be any justification for the arrest of the person without warrant, for example, murder? [A. H.]

ANSWER

Since section 39 of the Larceny Act is concerned with venue, it would seem that when subsection (2) says that a man may be " dealt with, indicted, tried and punished in any other part of the United Kingdom " it comprehends only dealings by or on behalf of the court, and not dealings by individuals such as, *e.g.*, arrest without warrant. Against this it could be argued that as subsection (1) uses the words " *proceeded against,* indicted, tried and punished," the substitution in subsection (2) of the words " *dealt with* " for " *proceeded against* " shows that subsection (2) comprehends dealings other than by or on behalf of the court. Even if that were so, it is suggested that the dealing must at least be one authorised by the Act, so that if arrest without warrant is in question, the arrest must be under section 41 (if applicable), and not at common law.

As far as common law powers are concerned, it seems clear from *Diamond* v. *Minter,* [1941] 1 K.B. 656, and the authorities there cited, that there is no power to arrest without warrant on suspicion of a felony committed outside England and Wales.

[D. W. E.]

Letters to the Editor

Magistrates' Courts Act, 1952, s. 25 (4)

Dear Sir,

It has been pointed out to me that in the latest case of Mr. Sutterthwick's reported in the *Criminal Law Review* ([1958] Crim.L.R. 298) it is shown that Mr. Frell is guilty of a practice which is a bad one and does not conform with the intentions of Parliament.

It is stated in the account of the case in question that the magistrate realises that the defendant has a previous conviction for brothel-keeping because the clerk has taken from her a provisional election to be dealt with summarily. This indicates that Mr. Frell only informs a defendant charged with such an offence of a possible right to be tried by a jury if he knows that there is a previous conviction. Section 25 (4) of the Magistrates' Courts Act, 1952, is, however, so worded that obviously it is intended that, in the case of any charge for such an offence or any offence where a further conviction brings a liability to imprisonment for more than three months, the defendant should be informed of the possibility that trial by jury might be claimed. I am afraid that Mr. Frell jumped to the conclusion that the section in question was only intended to give formal recognition to a practice which was common before the passing of the Act, but I think it is clear that the section is intended to do more than that and, in fact, it does away with the possibility that magistrates might draw certain inferences from the fact that a provisional election to be dealt with summarily was taken.

I suppose, really, Mr. Frell has been doing the job too long and has got too set in his ways. He ought really to retire, but cannot afford to do so.

Yours, etc.,
A. E. JONES.

Marlborough Street Magistrates' Court.

R. v. Sutcliffe [1]

Dear Sir,

As you know we were the solicitors for the prosecution in this case. The writer personally conducted this case before the Maidenhead Bench, the Committing Justices, and he was present throughout the hearing at Berkshire Quarter Sessions. We have perused the comment on the case and it appears to us that the learned commentator has based his remarks on an erroneous assumption, namely that the prosecution adduced evidence of Sutcliffe's mode of life. This was not so. The only item referred to in the paragraph quoted on page 254 to which the prosecution made reference was by the two police officers who merely said that at the time of his arrest at about 9 a.m. on the day during the early hours of which the crimes had been committed, Sutcliffe was wearing evening dress. Sutcliffe gave evidence on all the other points during the time he was in the witness box. In examination in chief, in seeking to establish an alibi, Sutcliffe, who described himself as a docker, gave evidence as to his movements from 8 p.m. on the evening before his arrest through the night and to the time of his arrest. This included a visit to a public house, a trip in his van and a visit to a club. He also volunteered the information that he owned a Mercedes-Benz in addition to the van. We believe that it was in reply to the Deputy Chairman's question that Sutcliffe said when he had last worked and also what his income was. This question as you will see arose quite naturally out of Sutcliffe's evidence. The evidence of " debits " does not put Sutcliffe's character in issue, but it seems quite proper to inquire the " credits " to meet these. The point of Sutcliffe's evidence was (a) that he was somewhere else spending money and (b) that owing to his ownership of the Mercedes-Benz and the van he was not in need of money. If his income was £9 per week as he said would Sutcliffe be spending money on the scale he said he was, and in the alternative would he not be in need of money if he was only in receipt of £9 per week, *i.e.*, he must have been lying over either his activities or his income, and that being so could he be believed when he put forward the alibi and refuted the whole of the police officers' evidence as to his alleged statements immediately prior to arrest. It is in this way, as we understand it, that the Chairman referred to Sutcliffe's evidence and not to show that he must be a man who got his living by dishonest means.

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[1] [1958] Crim.L.R. 254, 255.

Yours faithfully,
KNIGHT & MAUDSLEY,
Solicitors.

Maidenhead, Berks.

Books and Periodicals

Reviews:

Teach Them to Live. By Frances Banks. Foreword by the Rt. Hon. Lord Birkett. London: Max Parrish & Co. 1958. 277 and (bibliography and index) 10 pp. (30s. net.)

With her unusual experience of tutor organiser for five and a half years at the all male prison at Maidstone, the authoress faces up to the difficult task of the prison authorities. Their aim, she explains, should be to broaden the horizons of prisoners, so that they may become better equipped to earn their own living, and more willing to conform with accepted standards of conduct. The vital need is to direct a man's practical energy, for to quench this is to quench the very life-essence.

The task is difficult, as Miss Banks points out, while so many prison staff are involved in supervisory duties only. At the same time education in prisons is carried on quite separately, on a shoestring budget. Miss Banks carefully documents all possible evidence of progress, yet clearly reveals that further education in prisons must be integrated with the programme of daily work. Training far too often consists only of voluntary classes after long hours have somehow been filled in without too much relationship to the rehabilitation of the prisoner. I like the book because Miss Banks not only sees the deficiencies—albeit with a kind eye—but she also points to some sensible remedies.

JEAN GRAHAM HALL.

The Hamlyn Lectures: Protection from Power under English Law. By Lord MacDermott, Lord Chief Justice of Northern Ireland. London: Stevens & Sons, Ltd. 1957. viii and 196 pp. (16s. 6d. net.)

In this, the ninth series of Hamlyn Lectures, Lord MacDermott has chosen to range over a very wide field. Under the heading of "The Power of Prosecution" he considers whether the accused should have to submit to interrogation at his trial and concludes that such a change in the law would serve no useful purpose. (Dr. Glanville Williams in his 1955 Hamlyn Lectures, just republished in a second edition, argues to the contrary.) He examines the position of the Attorney-General in relation to the executive, especially his responsibility for the enforcement of the criminal law, and emphasises the importance of his independence of the government in this respect. "The Power of Parliament" and "The Power of the Executive" take us into the field of Administrative Law—quasi-judicial decisions, delegated legislation, the prerogative remedies, the immunities of the Crown, etc. In "The Power of Wealth and the Power of Status" we find a very mixed bag: a discussion of the position of the great public service corporations; the working of the Legal Aid and Advice Act, 1949; and the statutory and common law protection of employee against employer—the Truck Acts, Factories Acts and the vicarious responsibility of the employer. "The Power of Monopoly and Restrictive Association" is mainly concerned with the Monopolies and Restrictive Practices Acts; and "The Power of Numbers" is a discussion of the history of the law relating to trades unions and their powerful position in society today.

The topics discussed are so diverse that the book is necessarily a little disjointed. The connecting factor is that under every heading there arises a risk of the oppression of the individual by concentrations of power and, consequently, a problem for the law in holding a just balance between power and liberty. In some cases, Lord MacDermott is content to pose the problems but he also makes several interesting suggestions for reform: *e.g.,* the establishment of an "Administrative Council" to which Ministers could refer problems for guidance or decision; a panel of experts ("clause-tasters") to scrutinise the drafting of new legislation; the extension of *prohibition* and *certiorari* to administrative acts and decisions not of a judicial nature; and so on.

All the questions discussed are—or should be—of great public interest; and Lord MacDermott's aim to provoke thought about them is an admirable fulfilment of the object of the Hamlyn Trust that the "Common People" should recognise the responsibilities and obligations attaching to them. For, as Lord MacDermott concludes, it is on the people themselves that liberty, in the last resort, depends.

J. C. SMITH.

Books Received:

The Common Calendar. By Sir Fred Eills Pritchard, M.B.E., LL.D. London: Butterworth & Co. 1958. 250 and (index) 6 pp. (32s. 6d. net.)

The Lamberts Choose the Law. By Michael Thomas. London: Chatto & Windus. 1958.

Administration of Justice in Norway. Edited by The Royal Norwegian Ministry of Justice. Oslo. 1957. 145 pp.

Kenny's Outlines of Criminal Law. Seventeenth edition by J. W. Cecil Turner. Cambridge: The University Press. 1958. 612 and (index) 17 pp. (60s. net.)

Reader's Digest:

Court: Power to commit witnesses to prison: 225 *Law Times* 241.

Police: Confessions: 66 *Police Review* 340.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect*

Books for review should be sent to the Publishers at the above address.

THE CRIMINAL LAW REVIEW

Editors

JOHN BURKE and PETER ALLSOP, M.A.

Barristers-at-Law

Assistant Editor

A. L. NOAKES, B.A.

Editorial

The function of the criminal law

At a dinner given by the Lord Mayor of London to Her Majesty's Judges on July 9, the Lord Chief Justice, Lord Goddard, spoke strongly of the deterrent function of the criminal law.

Lord Goddard said that a good deal was heard about inquiries into the causes of crime; for himself, he believed that the causes were the same as in the days of the Old Testament. He did not think that the function of the criminal law as a deterrent was sufficiently recognised: the criminal law as law was not concerned with the reform of the criminal; that was a matter for those persons and societies who, to their honour, were trying to do something about it. The judges were concerned with the protection of the public and with the interests of the victim as well as the criminal. The courts would have to administer the criminal law fearlessly.

These remarks serve a purpose in maintaining the proper balance between concern for the criminal and protection for victims of crime which are equally matters of public interest.

The Criminal Justice Act, 1948, in the working out of which Lord Goddard has had a leading part (see [1954] Crim.L.R. 687) placed in the hands of the courts new methods of dealing with offenders and abolished a number of penalties, for example, penal servitude and hard labour, whose function was regarded as purely deterrent. Following the coming into force of that Act much has been done by the Home Office, particularly during the present Home Secretary's tenure of that office, to change the emphasis in our prisons and other penal establishments from deterrence to reform. This work will, however, be wasted unless the courts not only know what type of institution they are sending each criminal to and what the aims of each type of institution are, but are also zealous to see that each criminal receives the sentence most suited to preventing him from becoming or continuing to be a menace to society, whether that sentence be curative or deterrent. Of recent months there have been complaints that the courts are hampered in their task by lack of information about the prisoners before them and the treatment available. The Home Secretary has now announced the appointment of a Departmental Committee under the chairmanship of Streatfeild J. with the following terms of reference:

> "To review the present arrangements in England and Wales (*a*) for bringing to trial persons charged with criminal offences, and (*b*) for providing the courts with the information necessary to enable them to select the most appropriate treatment for offenders, and to consider whether, having regard to the desirability of ensuring that cases are brought before the courts and disposed of expeditiously, any changes are required in these arrangements or in those for the dispatch of business by the courts; and to report."

We are also pleased to note that the interests of the victims of crime have not been entirely forgotten in this search for ways of improving the working of the criminal law. The Home Secretary is looking very closely into the question of setting up some scheme of compensation for victims of crimes of violence. Much of the credit for this scheme belongs to the late Margery Fry, and there could be no more fitting tribute to her lifetime of service in the social services than to see such a scheme brought into operation.

The appointment of chief constables

In an address to the annual conference of the Association of Chief Police Officers of England and Wales, the Home Secretary, Mr. R. A. Butler, spoke of the recent cases of breaches of trust by police officers. He said that these breaches of trust have been of so grave a nature as to raise a question whether there is anything seriously wrong with the police service and its organisation. Lack of pressure on the police from either central or local government was fundamental to the enforcement of law, but the police should not enjoy such power and independence that they are exposed to temptation and corruption.

Mr. Butler stressed that the personality and standards of the chief constable of a police force have a very considerable effect both on the force he commands and on the community generally. Police Authorities have great freedom of choice in the selection of chief constables, subject only to Police Regulations and the approval of the Home Secretary. It was Mr. Butler's responsibility to see that the Police Authorities exercised their powers wisely, and that the best man was selected for each vacancy. It was important that the Authorities were properly informed of the field of choice, and that the position was properly advertised.

Referring to the question of local appointments, the Home Secretary said that, while they should not be ruled out altogether, he felt that the service, as a whole, would benefit if senior officers, particularly chief constables, were appointed from outside the particular unit or at least had experience in more than one force. In considering future applications for Home Office approval for appointments he would have to bear in mind the strong arguments against putting at the head of a disciplined body of men someone who had worked his way up in that body.

The first consideration in these matters, Mr. Butler continued, was that the best men were brought to the top. The training and background of police officers was a matter to which he attached the utmost importance. While police work was essentially practical, there was a need for recruits with a broad and liberal educational background. Accordingly, he was taking steps to ensure that information about police careers was made available to schools and universities.

Once in the service it was necessary to give these young men opportunities to broaden their knowledge and experience. The Police College was playing an important part in this, and forthcoming changes in the courses would further this work. He welcomed the recent opportunities for service in Malaya, Greece, Austria, Germany and Cyprus, which had been taken by many police officers, and he hoped that advantage would be taken of the provisions of the Overseas Service Act, 1958, which would increase these opportunities by enabling police officers to serve abroad for short tours of duty. The Home Secretary added that he was examining whether there was more scope for officers occasionally to take sabbatical leave for courses of study at home or abroad.

These comments from the Home Secretary are very welcome. It is some time since consideration was given to the question of the selection of senior police officers. The last occasion on which the subject received prominence led to the foundation of the Hendon Training School which has given the police forces many valuable senior officers. The problem left unsolved is how to combine practical experience with the liberal educational background which the Hendon type of training provides. The Police College seems to us to hold the solution to the problem: it accepts for training police officers above the rank of sergeant and these, of necessity, will have had some years of practical police work. If the College can add to this a liberal general education, its work will be of great value to both police and public.

Lastly, Mr. Butler's statement that, on the whole, the appointment of chief constables from within the force they are to lead is not to be desired, seems to be in direct contravention to Home Office practice in recent years. It seems that the appointing authorities have had no definite guidance from the Home Office in these matters, and, in view of recent events, it is to be hoped that Mr. Butler's statement is only a beginning of his interest, and that he will carry the matter further.

Making crime pay

Much of the burden of the cost of defending poor prisoners has, in the past, fallen on the legal profession. This summer the Home Secretary is proposing to enter into discussions with the Bar Council, the Law Society and the Associations of Local Authorities with a view to implementing the provisions of sections 21 to 23 of the Legal Aid and Advice Act, 1949. These are the sections which provide that counsel and solicitors shall be paid according to the work actually and reasonably done in connection with legal aid, defence and appeal aid certificates.

In the meantime, the Council of the Law Society has published a draft scale of fees which they suggest should apply in respect of legal aid, defence and appeal aid certificates and appeals to the Court of Criminal Appeal. This draft scale has been submitted to the Lord Chancellor for approval.

Psychopathic criminals

An article in the *Medical World* by Mr. Hugh Klare, secretary of the Howard League for Penal Reform, suggests that the appointment of mental health stipendiary magistrates with medical, as well as legal, qualifications, might be a valuable step towards the prevention of some murders. The psychopath, he argues, tends sooner or later to find himself in conflict with the law (Mr. Klare cited the case of Neville Heath as an example); in such cases, medically qualified magistrates would be in a position to recognise the potentially dangerous psychopath for detention and treatment. A further help in the work of preventing murders by psychopaths would be diagnostic clinics, and those planned by the Home Secretary should improve the chances of spotting the relatively few psychopaths who constitute a real danger. If this could be done the problem of correct treatment for aggressive criminal psychopaths would become more urgent.

With other types of murderers the problem of prevention was more difficult as it is difficult to foresee the sudden psychotic breakdown which might lead to murder. Over the last fifty years it had been found that 65 per cent. of all murderers were insane before, during or after their trial.

Of child murders, Mr. Klare said that it is a sobering thought that the real threat comes from parents. Of forty-two children murdered between March and December, 1957, thirty-four were killed by parents. Most of these parents were suffering from depression and afterwards committed suicide.

Vehicles stationary in traffic

The correspondence columns of *The Motor*, June 4, contain a letter in which the writer states that he has always understood that the practice of maintaining a car stationary in traffic by the interplay of clutch and accelerator pedals is illegal, the law being phrased around the principle that the gear lever must always be in neutral if the engine is running. So far as we are able to discover, there is no foundation for the writer's belief. The Motor Vehicles (Construction and Use) Regulations contain no guidance on this point and neither the motoring associations nor the Metropolitan Police Traffic Department at New Scotland Yard could suggest any reason why this practice should be believed to be illegal.

Quis custodiet . . . ?

A theft of 20,000 dollars (over £7,000) from a safe in a New York police property clerk's office is believed to be an " inside job."

Appeals to the House of Lords

Of 976 applications since January 1, 1949, for leave to appeal to the House of Lords under the Criminal Appeal Act, 1907, two were made by the Director of Public Prosecutions, one was made by the Board of Trade and the remainder by defendants. Since the passing of the 1907 Act, twenty-one applications have been granted (H.C. Debates, Vol. 589, col. *13*, June 10).

Judicial appointments

Joseph Thomas Molony, Esq., Q.C., has been appointed a Commissioner of Assize on the Midland Circuit.

John Huxley Buzzard, Esq., has been appointed Recorder of the Borough of Great Yarmouth.

The Honourable James Roualeyn Hovell-Thurlow-Cumming-Bruce has been appointed Recorder of the City of York.

Gerard Gustave Lind-Smith has been appointed Recorder of the Borough of Birkenhead.

Other appointments

Mr. Justice Barry has been appointed Chairman of the Advisory Council on the Treatment of Offenders in place of the late Earl of Drogheda.

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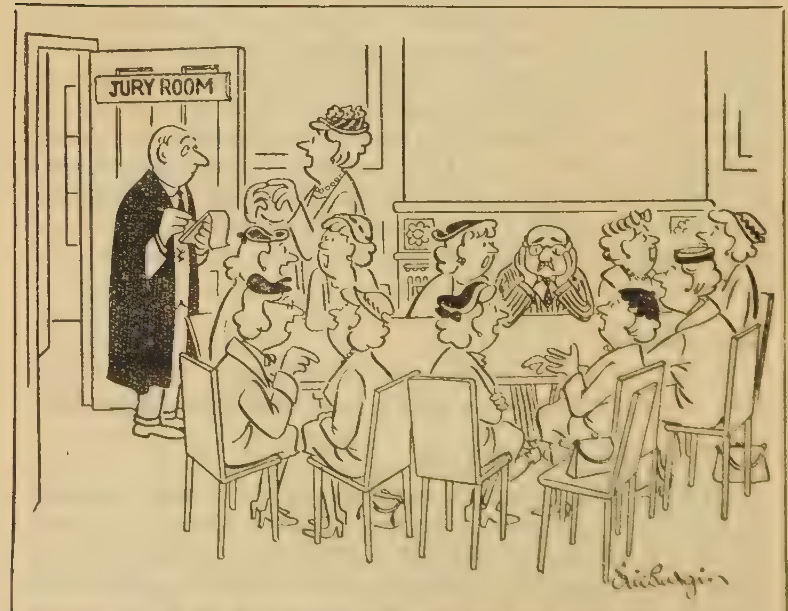

"Seven teas with sugar, four without, and one large brandy"

Intent to Defraud

By G. H. L. FRIDMAN, M.A., B.C.L., LL.M., *Barrister-at-Law,*
Lecturer in Law, University of Sheffield

The Larceny Act, 1916,[1] makes guilty of misdemeanour " every person who by any false pretence (1) with intent to defraud obtains from any other person any chattel, money or valuable security or causes or procures any money to be paid or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person. . . ." Among the points which have arisen on the interpretation and application of this enactment is the question of " intent to defraud." This is a phrase which occurs in other enactments[2]; and it has given rise to some difficulty, not least in the case of *Potter*[3] decided this year. The precise question involved is what is the meaning of " defraud."

The economic aspect

Two observations can be made at the outset. First, it is well known that for the purposes of the law of larceny and false pretences the economic value of the thing stolen or obtained by false pretences need only be negligible in order to give rise to liability. But the thing must have some economic value, though the real value of the thing may be greater than the superficial value. Moreover, the real value which is obtained may be distinct from a tangible object and its superficial value. For example, where a railway ticket for a journey was obtained by false pretences, the fact that the ticket itself was returned at the end of the journey did not mean that the accused was not guilty of the offence; for, although the superficial value of the ticket was not lost to the railway company, the real value of the ticket, *i.e.*, the price of the fare, was.[4] Secondly, the " intent to *defraud* " is often contrasted in statutes with the " intent to deceive "[5]; this distinction seems to be of some importance, and it appears to rest upon the difference between misleading people as to the truth (deceiving them) and depriving people of objects of economic value (defrauding them). But in a classic statement Buckley J. explained the difference between these two forms of dishonesty in a way which at first sight may appear to have obscured the economic aspects of defrauding. What he said in *Re London and Globe Finance Corporation, Ltd.*,[6] was this:

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[1] 6 & 7 Geo. 5, c. 50, s. 32 (1).

[2] *e.g.*, Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), ss. 1, 4; Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 3; Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 154; Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 82, 83, 84.

[3] *R.* v. *Potter* [1958] 1 W.L.R. 638; [1958] Crim.L.R. 472.

[4] *R.* v. *Boulton* (1849) 1 Den. 508; *cf. R.* v. *Chapman* (1910) 4 Cr.App.R. 276.

[5] *e.g.*, Larceny Act, 1861, s. 84; Forgery Act, 1913, s. 4 (2).

> "To deceive is, I apprehend, to induce a man to believe a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Here the learned judge first introduced the economic aspect of defrauding when he spoke of "to deprive by deceit," and then went on to omit it by speaking of the inducement of a "course of action"—which might not involve economic loss, as Dr. Glanville Williams suggests when he queries whether on this definition there would be an intent to defraud if a man forged a letter in order to induce another to walk to a certain spot[7] (or by making a false statement induced the other to walk to the spot). But if it is remembered that, in the second form given to the distinction, Buckley J. was speaking "more tersely," it would appear that the learned judge was not really disposing of the economic aspect of defrauding, and that, in fact, he had in his mind all the time the need for showing that the false pretence (or forgery, etc., as the case may be) produced economic loss. Moreover, the offences in respect of which leave to institute criminal proceedings was being sought in this case, were offences which appear to be likely, if committed, to produce economic loss, *viz.*, altering or falsifying books or papers of a company, making false entries in books of account (Larceny Act, 1861, s. 83), making false statements with intent to deceive or defraud members, shareholders or creditors of a company (*ibid.*, s. 84). So that it is suggested that in this oft-cited statement Buckley J. was making clear the element of economic loss in the meaning of "intent to defraud."

But the later cases in which this point has been raised, and the words of Buckley cited, have not always accepted this interpretation, and have left the position far from clear.

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[6] [1903] 1 Ch. 728, at pp. 732–733 (a case arising out of, *inter alia*, the Larceny Act, 1861, ss. 83, 84).

[7] *Criminal Law, The General Part*, at pp. 76–77.

Acting to one's injury

In *R.* v. *Bennett & Newton*[8] the defendants, by false pretences that they were connected with a New York newspaper proprietor and that certain land was to be bought in Canada to provide wood pulp for the newspaper, induced X to give them a large sum of money. In fact some land was bought on behalf of X; but it was not bought at the price quoted to X, but much more cheaply. Moreover, the land was not of the utility it was alleged to have. "The land bought . . . had no special advantage and he [X] did not obtain what he was led to expect he would."[9] It was argued for the defendants that because some of the money obtained from X was laid out in the purchase of land in Canada, which was what X intended, the conviction of the defendants could not be supported, because the trial judge had excluded evidence of the value of the land and had made it impossible for the defendants to show that X had not been induced to act to his injury: and so there was no "intent to defraud." The Court of Criminal Appeal refused to accept this argument. On the question of value, *i.e.*, economic loss, the court was satisfied that the exclusion of the evidence was justified; for, although the evidence might have shown that so far as monetary value was concerned X had not in fact been deprived of anything, yet since X only gave the money to get land with "particular and peculiar advantages"—which it never had—he had been led to act to his injury. Hence, he had been defrauded, *i.e.*, he had been led to act to his injury by deceit. But on the facts of this case it might be argued that, whatever the alleged value of the land, X had paid the defendants more than they had spent in buying it, and therefore had suffered economic loss which he would not have suffered if he had bought the land directly himself, or through honest agents. Moreover, the strength of the case as an argument in favour of the non-economic interpretation of "intent to defraud" is somewhat lessened by the statement that there was no intention of laying down "as a matter of law" that evidence of value in a case of false pretences is immaterial.[10]

However, the matter was taken further in *R.* v. *Bassey*.[11] There the defendant, by a forged document which stated that he had passed certain qualifying examinations and was a person of good character, induced the Benchers of the Inner Temple to admit him as a student. He was convicted of forgery and uttering forged documents, and the Court of Criminal Appeal upheld those convictions although the Benchers had not suffered any financial loss. It was argued that there had been no intent to defraud, merely an intent to deceive. But the court, after referring to the words of Buckley J., said that the evidence showed an intention to defraud because the defendant has " intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude." [12]

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[8] (1913) 9 Cr.App.R. 146.

[9] *Ibid.*, at p. 155, *per* Darling J.

[10] *Ibid.*, at p. 156.

[11] (1931) 22 Cr.App.R. 160.

Textbook writers have criticised and rejected this interpretation of the " intent to defraud." Mr. Turner, in his edition of Kenny's *Outlines of Criminal Law*,[13] argues that it invokes a logical error: for while " to deceive " is clearly within " to defraud," it is wrong to include " to defraud " within " to deceive "; since a man may be deceived without being deprived of anything. This, it is submitted, is not very helpful, for it avoids what is really the main and practical question, namely whether the notion of defrauding should be defined or utilised so as to make it coterminous with the notion of deceiving. Defrauding could be defined so as to include inducing a man to act to his injury in a way other than one involving economic loss. It could be defined so as to exclude such acts. That is the very question; and logic alone will not be decisive. On the other hand, Dr. Glanville Williams' practical approach is more telling.[14] Deceits are usually practised to induce a course of action (or abstention from action); so that describing defrauding as inducing a course of action is not to add anything by the use of another word. Moreover, " in ordinary language defrauding involves the idea of economic loss." He therefore concludes that since Parliament must have intended some purpose by the distinction between " intent to defraud " and " intent to deceive," the words should be interpreted so as to give effect to that distinction: and if the construction adopted in *R.* v. *Bassey* correctly represents the law then the legislature should step in and reinforce the apparently important distinction it intended to make.

The present state of the law

However, the question arises whether *Bassey's* case does correctly represent the present state of the law. In *R.* v. *Kritz* [15] the defendant paid into his account worthless cheques which he knew were drawn on men of straw. By a false pretence he persuaded the bank to give him cash for the full face value of the cheques before they were cleared. With this money he was able to pay sums into the accounts of the drawers of the worthless cheques to enable them to be met. The result, therefore, was that the bank got back the money which had been paid out to the defendant (it was almost as though by a false pretence the defendant had obtained a temporary loan of the money, not the money itself). Nevertheless, it was held that the defendant had been properly convicted of obtaining by false pretences. The trial judge had directed the jury that it was immaterial that the defendant intended, if he could, to repay the money, even if, in fact, it could be said (as here it could) that he did repay the money, as long as he obtained the money by means of false pretences with intent to defraud. "And to defraud," said the judge, "means by deceit to get other people to take a certain course of action that is harmful to them." When this direction was said to be wrong by counsel arguing in the Court of Criminal Appeal, the court referred, with approval, to the famous direction of Channell J. in *R.* v. *Carpenter*.[16] There it was said that even if money obtained by false pretences were repaid there would still be "defrauding" because "you are giving him" (the man from whom the money was obtained) "something altogether different from what he thinks he is getting." Hence, the direction in *Kritz* was correct because it came within the remarks of Channell J. In this case, therefore, it would appear that although the bank had not in fact lost anything of economic value, there was an intent to defraud. Could it not be argued, however, that in this case the bank, by a false pretence, had parted with the ownership (as well as possession) of its money for a time during which it could have been used to greater economic advantage as far as the bank was concerned (providing interest, for example) and therefore had lost something of value? If this is correct, then *R.* v. *Kritz* and the direction of Channell J. in *R.* v. *Carpenter*, do not support the interpretation of intent to defraud adopted in *Bassey's* case.

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[12] *Ibid.*, at p. 162.
[13] 16th ed., 1952, at p. 301.
[14] *Criminal Law, The General Part*, p. 77.
[15] [1950] 1 K.B. 82.

Merchandise Marks Act, 1887

Another case in which the phrase came up for consideration was *Kat* v. *Diment*,[17] in which the Divisional Court was concerned with the phrase "intent to defraud" in section 2 (1) (*d*) of the

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[16] (1911) 22 Cox C.C. 618, at p. 624.

[17] [1951] 1 K.B. 34.

Merchandise Marks Act, 1887.[18] That section makes guilty of an offence " every person who . . . applies any false trade description to goods . . . unless he proves that he acted without intent to defraud." The defendants sold bottles labelled " non-brewed vinegar," which was a description well known in the trade (including the retail trade selling to the public), but containing what was in fact not " vinegar " at all, in the sense that it was a synthetic product, not the result of natural fermentation. The Divisional Court held that the magistrate was correct in finding that a false trade description had been applied to the goods. But, since the description used was one which was perfectly well known and understood in the trade (and by the Ministry of Food, too), and conveyed to the trade what kind of goods were being sold, it was argued that there was no " intent to defraud." Lord Goddard, in his judgment, rejected this argument on the ground that innocence that the statute was being infringed was not a defence as long as the *act* prohibited by the statute was done intentionally—as it was here. But, with all respect, many of the cases relied upon by the Lord Chief Justice were prosecutions under other parts of the Act,[19] in which the phrase " intent to defraud " does not appear; and although innocence that the acts are wrongful, *i.e.*, that the description is false, may not be a defence under those parts of the Act, it would not seem to follow that the offence under section 2 (1) (*d*) is committed unless there is a clear intention to defraud. What " defrauding " means here is shown by the one reported case which did come under this subsection, *Stacey* v. *Chilworth Gunpowder Co.*[20] There the defendants supplied gunpowder similar to, and as good as their own, and sold it to the government bearing their mark; the offence was clearly committed because there was the intent to pass off goods as something other than what in fact they were. In that case there was the " intent to defraud " because, as Lord Coleridge said,[21] ". . . a particular article, manufactured by a particular person, had acquired a widespread reputation . . . and someone supplied another and a different article under that name, so as to make the purchaser take something which he did not know he was taking." Mathew J., construing the Act, said,[22] " the words ' intent to defraud ' mean more than an intent to cheat a customer. . . . The words ' without intent to defraud ' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected." These statements, it is suggested, indicate that, as in *R.* v. *Kritz*, what is involved is intentionally inducing people to act to their financial or economic disadvantage, by the use of a false trade description. But in *Kat* v. *Diment* both Lord Goddard C.J. and Byrne J. (who quoted the language of Buckley J. already set out) took the view that as long as the description was false and was intentionally used in the sale of the goods, there was the "intent to defraud" within the Act, despite the fact that those who bought these goods knew precisely that what they were getting was not "vinegar," though the word occurred in the description. On this case the suggestion is respectfully made that the question whether *mens rea* was required under the Statute was confused with the issue of "intent to defraud," to the detriment of any clear understanding of what that phrase means.

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[18] 50 & 51 Vict. c. 28.

[19] *Wood* v. *Burgess* (1889) 24 Q.B.D. 162; *Stone* v. *Burn* [1911] 1 K.B. 927; *Allard* v. *Selfridge & Co., Ltd.* [1925] 1 K.B. 129; *Mercer* v. *Pyramid Sand and Gravel Co.* (1945) 109 J.P. 54.

[20] (1889) 24 Q.B.D. 90.

[21] *Ibid.*, at p. 96.

[22] *Ibid.*, at p. 97.

Falsification of accounts

More light is thrown on the phrase by the case of *R.* v. *Wines.*[23] There the defendant was convicted (*inter alia*) of falsification of accounts, a crime which involves "intent to defraud."[24] The prosecution alleged that he had made false entries to conceal the fact that he had stolen goods belonging to the shop for which he worked: the defendant explained what he had done by saying that it was to make it appear that the gross profit was greater than it actually was, in order to avoid dismissal and loss of wages. At the trial the judge directed the jury that whichever was the true reason for the falsification there was the intent to defraud. The Court of Criminal Appeal upheld this direction. 'Clearly, if the object had been to conceal his theft the defendant would have had the intent to defraud: but if his object had been to avoid dismissal because of unsatisfactory returns on his work the court said that there would still have been the intent to defraud because the shop "by his falsification would have been induced to retain him in their service and to pay him wages and he would have been getting wages . . . by means of a false representation, that is to say, by falsifying the accounts."[25] His false entries had induced a course of action, not merely a state of mind, as the language of Buckley J. (cited by Lord Goddard) required in cases of defrauding. There can be little doubt that here economic loss was caused by the false representation of the defendant, whether it took the form of failure to recover stolen goods, or payment of wages to an unsatisfactory servant who would have been likely to be dismissed if the truth were known.

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[23] [1954] 1 W.L.R. 64.

[24] Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24) s. 1.

[25] [1954] 1 W.L.R. 64 at p 66 per Lord Goddard C.J.

R. v. *Potter*

However, the last and latest case to be discussed does not involve the economic aspects of defrauding, which have been stressed in this article, as, it is suggested, most of the reported cases say it should; instead, the court (Paull J.) went back to the notion of inducing an injurious action without economic consequences, which was put forward in *R.* v. *Bassey*. The case in question is *R.* v. *Potter*.[26] There two brothers were charged on a number of counts arising from a plan they made to get a driving licence for one (Alan) by the other (William), who was a qualified driver, taking his place at the driving test. William presented himself for the test, produced Alan's appointment card, told the examiner he was Alan, and signed the examiner's journal in the name of Alan. After passing the test, William signed the certificate of competence in Alan's name, gave it to Alan, who presented it to the motor taxation office and got a driving licence. The two were charged with conspiracy: as to which no point of law arose. But they were also charged with obtaining a certificate of competence and obtaining a driving licence by false pretences; and William was charged with two offences of forgery and Alan with one offence of forgery in relation to the entry in the examiner's journal and the certificate of competence. None of the facts was disputed, but it was argued that in law these charges could not stand on the facts admitted. All these offences involved the intent to defraud.[27] Therefore it was necessary to decide whether the notion of defrauding involved depriving someone of something of value, *i.e.*, economic loss. The only case to which counsel and the learned judge referred was *R.* v. *Bassey*;

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[26] [1958] 1 W.L.R. 638.

[27] Two other points were also raised: (1) whether the certificate of competence had been "obtained" within the meaning of the Larceny Act, 1916, s. 32 (1) since all that had been obtained was the *loan* of the property which eventually was handed back. On this Paull J. was referred to *R.* v. *Kilham* (1870) L.R. 1 C.C.R. 261 and *R.* v. *Chapman* (1910) 4 Cr.App.R. 276, and held that the certificate had been "obtained" because William could have done what he liked with it. Moreover, it could be added, William had obtained it because he had used it in the only way in which it was valuable, *i.e.*, to procure a driving licence (*cf.* Fridman, "Property in the Law of False Pretences" (1957) 20 M.L.R. 464, at pp. 464-465 and note 6). (2) Whether the signature on the certificate, etc., was a forgery since it was not making the document false in order that it might be used as genuine, within the Forgery Act, 1913 s. 1 (1). On this Paull J. held that there was forgery because the documents were falsely filled in since William knew he had no right to fill them in.

and all that the learned judge did was cite from and rely upon that case, which he then applied to the facts before him. No mention was made of any of the cases dealt with above, in which the phrase "intent to defraud" had been considered; nor was there any reference to the textbook criticism of the *Bassey* case, which has also been mentioned and discussed in this article. Instead Paull J. adopted the attitude that by the false pretence the county council, which was the authority to issue the certificate and the driving licence, was induced "to take a course of action which they would not otherwise have taken and which it was not only their right but their duty not to take if they had known the true facts." [28] In this respect, therefore, the position of the county council was exactly that of the Benchers of the Inner Temple in *Bassey's* case. But Paull J. went further. He suggested that the county council were induced to part with a chattel, *i.e.*, a piece of paper on which there was printing and certain statements, which was sufficient for the charge. In this respect, the case was distinguishable from *Bassey's* case, where the Benchers parted with no property whatsoever. And this is undoubtedly a good ground for the conviction on these counts, since as long as what was obtained was of some economic value, however small, there is no doubt that the offence is committed (the same is true of forgery where an intent to defraud is relevant: see, *e.g.*, *R.* v. *Toshack*,[29] where the chattel forged, a certificate of a master of a ship about the character of a candidate for an examination, was valued at one penny, and the indictment was good). Thus, it is suggested, Paull J. could have reached his conclusion, that the offences were proved in law, without accepting and relying on *Bassey's* case: for the prisoners had indeed obtained something of value by their false pretences and forgery. It is therefore unfortunate that the learned judge was led to give further effect to the misconception and confusion involved in *Bassey's* case. For the conclusion which the present writer would submit is reached by an examination of the cases, is that economic loss, however minute or indirect, is required to be shown if a person is to be convicted of an offence involving the intent to defraud.

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[28] [1958] 1 W.L.R. 638 at p. 643.
[29] (1849) 1 Den. 492.

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G. H. L. Fridman

1958

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

Erring Youth

Common delinquent

The general appearance of the young man ushered into the dock by P.C. Mure, the assistant gaoler, was not calculated to engender in any magistrates' court a prejudice in favour of the accused. While it was true that the night he had spent in a police station cell had given him no opportunity to dress specially for the occasion, it seemed doubtful whether, in any circumstances, he could have conveyed a different impression of himself—or would even have tried to do so. His clothes, his hair style, the expression on his face and the way he spoke were almost a caricature of the popular conception of a " juvenile delinquent " ; though, from a legal point of view, Albert Cawdrell had very much run to seed in this phase of his development. Only a few special provisions still remained applicable to him out of the statutory code which up to two years earlier had guided his destiny.

Mr. Sutterthwick studied him and hoped that this would not be a case in which the demeanour of the accused turned out to be a decisive factor in the assessment of conflicting evidence. There proved to be no cause for apprehension on this score ; Cawdrell consented to summary trial and pleaded guilty to all three charges preferred against him.

" The prisoner is asking for thirty-seven other cases to be taken into consideration, your worship ; and the usual forms have been served and signed " said the detective sergeant in charge of the case, producing a sizeable wad of papers. The magistrate looked through it and then said to the defendant: " Is that right—do you admit these thirty-seven other offences and want me to take them into account when I deal with you on the three charges to which you have pleaded guilty? "

" Yes," said Cawdrell, with the curtness of one completing an irksome business transaction.

" Tell me about it," said Mr. Sutterthwick to the officer. " I see that all these offences are embezzlements, and he's described in my register as a van driver. How did he come to be handling money? "

" He wasn't supposed to collect accounts, your worship, but customers frequently offered payment on the spot for small deliveries; he would then write 'Paid' and his initials on the invoice, but on a number of occasions he kept the money himself. The total involved is £57 15s. 4d.—so far as the firm can ascertain—and it's spread over a period of seven and a half months. Cawdrell was employed by the prosecutors for just over nine months, but, of course, he has been discharged now. He was paid £6 15s. a week plus overtime."

"How was it his dishonesties didn't come to light sooner?"

"It was the usual system, your worship, of paying earlier accounts with money from later customers, while the deficit was snowballing all the time until, at last, he could no longer forestall bills being sent out to customers who had already paid. When they complained, investigations started and the whole matter came to light. The defendant quite frankly confessed when questioned, your worship."

"I don't see what else he could have done," commented the magistrate, and went on: "You said earlier that he had no right to accept money from customers. Am I to take it that, when he did so, he was acting in disobedience of definite instructions from his employer?"

"Yes, I understand so, your worship," replied the officer; and, meeting in advance what he concluded was in the magistrate's mind, he added: "But, with respect, your worship, it's still embezzlement because he received the moneys on behalf of his employer and in his capacity as a servant."

"That was certainly what I understood the law to be when I was reading for the Bar," said Mr. Sutterthwick, a little nettled. "However, what I'm seeking information about is not the law, but the steps the firm took when he paid over these earlier accounts you speak of, and so showed he was defying orders."

"I gather from my inquiries that nothing very much was said about it, your worship."

"They didn't mind their rules being broken so long as they got their money—or thought they were getting it?"

"I'm afraid that was the case, roughly, your worship."

"Well, they may have brought this on themselves to some extent, but that doesn't excuse this young man. Has he told you what has happened to the money?"

"He says it has all gone on clothes and gambling and entertainments of one sort or another. He says he hadn't realised it amounted to so much."

"What's known about him?"

"He is a single man, your worship, and has had a somewhat unfortunate history. His parents separated when he was quite young, and he has no idea of their present whereabouts, or whether they are alive even. He was brought up by an aunt, but, at the age of thirteen, he was dealt with by the juvenile court for being beyond control and sent to an approved school. He was licensed four years ago when he attained the age of fifteen, and then went back to live with his aunt. Nine months later he was put on probation for two years by the juvenile court for shopbreaking and larceny. Two years ago, just after his seventeenth birthday, he appeared before the adult court charged with taking and driving away a motor-vehicle without consent, and with using it without there being a third party insurance policy in force. He was fined a total of £7 on that occasion, and disqualified from driving for twelve months, but no action was taken on the breach of probation and the order was left in force. His last conviction was a year ago when he was sent to a detention centre for three months as a suspected person loitering with intent to steal from unattended cars. He got this job with the prosecutors on his release from the detention centre, and has been sharing a room with another man for the past six months."

"Did he give references when he was taken on by this firm?" asked the magistrate.

"Yes, your worship, but I understand they weren't taken up."

"Is what I've been told about you correct?" said Mr. Sutterthwick to the defendant.

"Yes."

"What do you want to say to me?"

"Nothing I can say, is there?"

"You could say you were sorry."

This suggestion obviously took Cawdrell by surprise, and he seemed to consider the possibility. There was a short silence and then Mr. Sutterthwick said: "I shall remand you a week for a Borstal report. You can say anything further next time."

Without prompting from Mure the defendant slouched nonchalantly out of the dock and made his way to the door labelled "Prisoners." There was a shuffling at the back of the court as a number of young men slouched out through the door labelled "Public." They looked almost as if they had been picked by some musical comedy producer as a chorus to the defendant's lead, so theatrically similar to his were their clothes, their coiffures and their slouches.

Gentleman delinquent

From the bran tub of the prisoners' assembly room the assistant gaoler now produced a surprise packet. "Remand Number One.

Peter Witheringhouse" could hardly have presented a greater contrast to the previous occupant of the dock if his appearance had been planned to produce that effect. But in the magistrates' courts pure chance is responsible for juxtapositions and coincidences more bizarre than imagination would venture to fabricate. Peter Witheringhouse, unlike Albert Cawdrell, was dressed with casual elegance, his manner was engagingly, not offensively, assured, and everything in his appearance spoke of good breeding. He looked thoughtful but not apprehensive, and his gaze met Mr. Sutterthwick's squarely. He resembled the previous prisoner in only two respects: both were nineteen and both had been dishonest.

"I appear for the defence this week," said Mr. Durnstable, rising from the solicitors' seat. His clients in Mr. Sutterthwick's court were not usually of this class; the case had been passed on to him by an old-fashioned firm of family solicitors who would have considered themselves almost disgraced by appearing in a police court, but who knew of Mr. Durnstable's reputation for fighting lost summary causes, and sometimes winning them.

Frell, the clerk, referred to his notebook and said: "You will remember, sir, that this defendant consented to summary trial and pleaded guilty last week to the three charges of obtaining money by false pretences which are entered in your register. The police asked for a remand for inquiries as they anticipated there would be further charges. In view of that you didn't go any further into the case last week. The remand was in custody."

"The accused is now asking for twenty-three other cases to be taken into consideration, your worship," said a detective constable. "I have the forms here which he has signed."

Once again the magistrate read through a sheaf of papers and obtained the defendant's oral confirmation of what he had acknowledged by his signature.

"Tell me the facts," said Mr. Sutterthwick to the detective.

"This young man, your worship, is single, and was educated at a well-known public school. When he was five his parents were divorced, and they have both remarried. Custody of the defendant was given to his father, but he has spent holidays alternately with each parent since. After leaving school he went into a bank to begin with, but he soon left that job, and he has been a car salesman up till recently when the firm for which he was working went bankrupt. He had a bank account which was started with money provided by his mother when he took employment in the bank. For some time now, nothing has been paid into that account and there has been a small credit balance of 13s. 2d. The manager had written to the defendant asking him to close the account because cheques had been presented which could not be met. In spite of that the defendant proceeded to issue a number of cheques on which he obtained money and goods. The cheques were all returned marked " Refer to Drawer " and the defendant must have known that there was no chance of them being met. That accounts for all the charges and the outstanding offences. The total value of the money and goods involved—he got credit by fraud for meals at hotels and restaurants in some cases—is £186, spread over the five weeks before his arrest. He had left his address and we had some difficulty in tracing him to execute the warrant. The money has apparently been spent on lavish entertainments, presents to friends and generally living up to a standard far beyond his means. He has no previous convictions. I have some of the cheques here if your worship would like to see them."

Sergeant Quing, the warrant officer, handed the exhibits to the magistrate who passed them down to the clerk after glancing at them.

" What the officer has quite fairly told you is perfectly correct so far as it goes, sir," said Mr. Durnstable, getting to his feet again. " But there are very unusual and very sad features in this case which—and I make no complaint of this—he has not brought out fully. When you have heard the full story I think you will be satisfied, sir, that though this unfortunate young man's offences are admittedly serious, there are, nevertheless, mitigating circumstances of an exceptionally . . . er . . . extenuating nature. You have already been told that the accused's parents were divorced when he was little more than a baby. In consequence he has never had the home life and family background of a normal child. Such an upbringing is bound to have a disastrous influence on a boy's whole outlook on life—— "

" Are you suggesting, Mr. Durnstable, that it is his upbringing that has caused him to swindle people with worthless cheques? " interposed Mr. Sutterthwick.

" Not directly, sir ; of course not. But I venture to submit that it is generally recognised that such circumstances in early childhood do have deleterious effects on behaviour—— "

" Such as? " interrupted the magistrate.

" I will do my best to explain, sir," said Mr. Durnstable with dignity. " A boy in that situation is in an emotional turmoil ; he is pulled both ways—by his mother and by his father and—— "

" Forgive my interrupting again," said Mr. Sutterthwick. " But was it his mother who was pulling him from his father or vice versa? "

" I'm not suggesting either, sir," said Mr. Durnstable hastily, remembering that his instructions explicitly forbade any adverse comment on either parent. " I'm only referring to what went on in the accused's youthful mind."

" What evidence is there of that? " asked Mr. Sutterthwick.

" Surely, sir, the evidence is in what has happened. His acts are not the normal conduct of a young man in his station in life. They are, I submit, well-known symptoms of a resentment against authority in general which springs from disappointment in authority as represented by parents. In that emotional condition anti-social acts become a sort of mechanism of relief—— "

" I have heard that your client went to a very good school. Did that make him resentful too? " the magistrate interrupted once more.

" No, sir, of course not. I have no criticism of the excellent scholastic establishment which the officer has been kind enough not to mention by name. But this is not a matter of the material background—beautiful buildings, comfortable conditions and that sort of thing. . . ."

" It's not only the material background, Mr. Durnstable. What about the headmaster, the staff, the other boys, the general spirit of a good school? Didn't your client benefit from them? I should have thought that, far from having had a bad start in life, your client had a very good upbringing for—how long was he at this school? "

" That isn't in my instructions, sir."

" Do you know? " said Mr. Sutterthwick to the detective. The officer consulted his notes and said: " Eight years, your worship—until the age of eighteen."

Mr. Durnstable took advantage of the intervention to lean across to the clerk and murmur: " Why is he going for me like this? I've got to say something."

" You ought to know by now what not to say," Frell whispered back.

Mr. Durnstable reflected a moment and resumed: " I do not dispute, sir, that everyone—parents, school and friends—have done all they could for my client . . . within their powers. No one could, however, give him what he could get only in a united home. Indeed, in an effort to make up for that loss, it is probable that his parents acted a little unwisely in that, separately, they tended to over-indulge him in the material luxuries of life. They are both persons of substantial means and they were in the habit of taking him during his school holidays to expensive restaurants and places of entertainment. He numbers among his friends, also, several quite well-off young people, and there is no doubt that he has been brought up to take for granted a rather extravagant way of living. He has been used to seeing cheques given in settlement of bills of all kinds. His father, however—naturally enough—wanted him to learn to stand on his own feet financially when he left school and he made my client only a comparatively small allowance once he took up employment. The boy soon found himself at a disadvantage when it came to going out with his friends, and he resorted to these cheques simply in order to repay hospitality shown to him, as much as anything. He has had very little benefit out of it himself. The goods obtained were mostly presents to young ladies of his acquaintance—perfectly respectable young ladies, I hasten to add—and the bills run up in restaurants and clubs were in connection with parties he gave for his friends. I know it was all very reprehensible, sir, but when it began it was more thoughtlessness than anything and then, when the situation got completely out of hand, he was afraid to go to his parents and, very foolishly, he attempted to keep out of the way until he could clear matters up. It is only fair to say that he had reasonable hopes of being able to replenish his bank account either from commission on the sale of cars or from monetary presents from his parents. I can give you this assurance now, sir, that whatever happens in this case, his father will make it a point of honour to compensate in full everybody who has lost by this young man's actions. If my client had only gone to his father before the storm broke—so to speak—he would probably never have appeared before you—— "

Mr. Durnstable broke off as he saw the clerk get up suddenly and speak to the magistrate, showing him, at the same time, one of the cheques produced by the detective constable. Mr. Sutterthwick listened and then said: " Mr. Frell has just drawn my attention to the fact that the cheque relating to the sum of £10 is dated for the day after the date the money was obtained. As the clerk points out, that made it only a promise that there would be money in the account to meet it, not a statement that there was actually a sufficient credit balance when the cheque was drawn. So one of the offences of false pretences to which the defendant has pleaded guilty is not false pretences in law . . . I don't know what the explanation is of this . . ."

The detective constable volunteered the explanation. " It was a Sunday night when the club proprietor in question cashed the cheque, your worship. He thought that it wasn't legal for a cheque to bear a Sunday date, and he himself asked the defendant to put Monday's date on it."

" Well, I'm afraid the result is that I can't accept the plea of guilty to that charge, and I shall have to dismiss it," said Mr. Sutterthwick.

"Thank you, sir," said Mr. Durnstable. "It makes no difference, of course, to the general picture. And my client feels just as ashamed of himself. I hope you will accept it from me, sir, that he does feel his present position most keenly and bitterly. For a young man of his social standing it is a terrible tragedy. If you can see your way to treating him leniently on this occasion—now that he has spent a never-to-be-forgotten week in prison on remand —I am confident that he will never do anything in the future to cause you to regret your decision. I ask you to bear in mind, sir, that already this affair must inevitably by its nature have had a disastrous effect on this young man's whole future career, while he still stands at the threshold of life. All he asks now from you, sir, is an opportunity to rehabilitate himself and lead a decent, honest life in future—in which task he will have the help, I need hardly say, of both his parents and of the friends who have stood by him in his trouble."

Mr. Durnstable sat down, and Mr. Sutterthwick, who had been staring fixedly at nothing, turned his gaze on the defendant and said: "Peter Witheringhouse, I think your trouble is a not uncommon one—you think too much of yourself and too little about other people. You have had misfortunes in your life, I have no doubt. So have most people. On the other hand, you have had advantages which have not been enjoyed by most of the young men I see standing where you are now. If I overlooked your offences I don't see how I could logically punish anyone. I should prefer not to feel obliged to sentence you. I realise what it means to a young man of your education and background. But it would be pointless to fine you. I think you are in need of a sharp lesson. You will go to prison for six weeks on each of the two remaining charges, and I take into account all the outstanding offences you have admitted."

"What reason do you give, sir, for committal to prison under twenty-one? " inquired Frell.

"What I've just said: needs a sharp lesson," said Mr. Sutterthwick.

"Tell him I advise him not to appeal," murmured Mr. Durnstable to his clerk.

At the touch of the assistant gaoler's hand on his arm, Peter Witheringhouse turned automatically to leave the dock, still with an expression of utter amazement and incredulity on his face.

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A. E. Jones
1958

An Australian Letter

By Norval Morris, ph.d.,
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For this letter there are four Australian cases to discuss which are of considerable significance to the formulation of important doctrines in the substantive criminal law. Considering Australia's population and her relatively low rate of crime, it is somewhat surprising how much attention her courts have devoted to analysing and developing some of the fundamental principles of the criminal law—an inarticulate awareness of convict origins may partly account for this judicial interest.

Killing the chicken thief

Modern authority is lacking on the question, "In what circumstances may a private citizen take another's life in the protection of his property, the prevention of a felony, or the arrest of a felon?" Nor is nineteenth century authority clear, as witness the contrast between the fates of Mr. Purcell and Captain Moir. According to Kenny,[1] in 1811 Mr. Purcell, a septuagenarian of County Cork, was knighted for killing four burglars with a carving knife. Megarry [2] suggests that the gallant ancient killed only three burglars, the other managing to escape, but agrees that Mr. Purcell was knighted for his endeavours. By contrast, consider the fate of Captain Moir who, in 1830, after fair warning to a trespasser, shot and killed him, and who was expeditiously executed for his ignorance of the law.[3] Dicey affirms that Captain Moir was "a well-meaning man imbued with too rigid an idea of authority. He perished from ignorance of law. His fate is a warning to theorists who incline to the legal heresy that every right may lawfully be defended by the force necessary for its assertion."

The recent decisions of the Victorian Supreme Court, the Court of Criminal Appeal and the Australian High Court in the case of *McKay* grapple with this problem of the justification for the use of lethal force against a felon and contribute significantly to its resolution.[4]

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[1] *Outlines of Criminal Law*, 15th ed., p. 117, n. 3.

[2] *Miscellany-at-Law*, 2nd impression, revised, 1956, p. 366.

[3] Dicey, *Law of the Constitution*, 8th ed., at pp. 489 to 490, and the Report of the 1879 Royal Commission, C. 2345, in a note at p. 44, both tell—differently—the story of Captain Moir.

[4] The case is reported in (1957) Victorian Reports 650 and (1957) Argus L.R. 648.

Gordon McKay, aged 27, lived with his wife and three children on a poultry farm belonging to his father. He earned his living as a postman but devoted part of his time to the conduct of the poultry farm. For some time there had been persistent thefts of poultry from the farm, evidence being given that in the previous three years 1,000 chickens had been stolen. McKay had diligently tried to prevent these thefts and once had captured a chicken thief who, upon conviction, was fined £10.

To assist him in further efforts, McKay had constructed a system of alarm bells on the doors of the fowl pens. At first light one morning the alarm rang. McKay took a ·22 calibre repeating rifle, crept to within 140 feet of the thief, rested his rifle on a strand of wire and opened fire. At the first shot the intruder turned and ran, at the second he dropped three fowls, at the fifth he fell and soon died. McKay's justification of his actions can be put in his own words to the police: " When I fired at this man, I aimed at him and I wanted to wound him but not to kill him. I consider I am entitled to wound a man who was stealing fowls on my property, especially when we have notices up ' Trespassers Prosecuted.' "

At his trial on a charge of murder before Mr. Justice Barry, McKay was convicted of manslaughter and sentenced to three years' imprisonment. On appeal, the conviction was affirmed and the sentence reduced to eighteen months. The High Court refused special leave to appeal. Five days thereafter, at the height of a press campaign sympathetic to McKay, the Attorney-General of the State of Victoria announced the decision of the Governor in Council to exercise the prerogative of mercy and to release McKay. The political and sociological aspects of this case are therefore also of interest.

The legal analysis in *McKay* of the limits of the justification of the use of defensive force against one committing a felony and the limits of the right to use force to arrest a felon are particularly valuable, as is the discussion of a verdict of manslaughter as the proper verdict when excessive defensive force is used. The case merits attention in the reports on these matters, which are too detailed and extensive for consideration in this letter; the case is discussed at length in Vol. 2, No. 3 of the *Sydney Law Review*.

In *McKay* the courts tended to agree with the fate of the unhappy Captain Moir, while the poultry industry, the press, and the politicians tended to agree with the knighting of the heroic Mr. Purcell. Any such divergence between the law and public morality is unfortunate. It may partly arise from the lack of clarity in the law on this question, a defect which *McKay* may help to remove.

Public mischief

The decisions of the English Court of Criminal Appeal in *Newland*[5] and of the Privy Council in *Joshua*[6] certainly limit the potency of *Manley*.[7] Whether, together, they emasculate it entirely is less obvious.

Towards the end of 1957, in South Australia, two extraordinary fake suicides were, apparently independently, performed. One of the mock suicides was that of one Copley, who was desirous of abandoning his wife and children and of beginning life afresh—with a younger lady—free from financial liability to his family. In searching for him or his body, two men lost their lives. When caught, Copley pleaded guilty to " public mischief " and was sentenced to a term of imprisonment. The defence counsel's task, and it was far from an easy one, was to persuade the trial judge to accept this plea, in order, presumably, to avoid trial on a charge of conspiracy to effect a public mischief in which his client and his client's *inamorata* would figure as co-accused.

A few days later Allen Todd was tried before Mr. Justice Reed of the Supreme Court of South Australia with " Effecting a public mischief (Common Law)." Particulars of the offence alleged against him were that he " by means of fake representations by conduct that he had been drowned in the River Torrens caused officers of the South Australian Police Department to devote their time and services and to incur expense in searching for him or his body thereby temporarily depriving the public of the services of those police officers and in so doing did unlawfully effect a public mischief."

Todd pleaded not guilty and his counsel submitted that there was no case in law to go to the jury, there being on the facts alleged no crime disclosed. The trial proceeded. The jury convicted Todd. Mr. Justice Reed then exercised his statutory discretion to reserve a question of law for consideration and determination by the Full Court of the Supreme Court, and postponed judgment accordingly. On a case stated the Full Court[8] decided that on the facts alleged no offence was disclosed. This freed Todd from liability, and the executive, quite properly, also released Copley. The case of *Todd* will be reported in the (1958) *State Reports, South Australia*.

The analysis in *Todd* of the existing English, Irish, Scots and Australian case law on public mischief is full and close, as is the court's discussion of the writings of the many commentators who have considered this issue. The decision is strong support for those whose view it is that, apart from the vague and ill-considered law of criminal conspiracy, it rests with the legislature and not the courts to create new crimes. Surely the proper reaction to the decisions in *Copley* and *Todd* is for jurisdictions desirous of dealing with this mischief to legislate to make it an offence intentionally, either by words or conduct, to waste the time and efforts of the police by falsely reporting or by conduct falsely indicating that a crime has been committed; the analogy with the common statutory offence of giving a false fire alarm is close.

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[5] [1954] 1 Q.B. 158; [1954] Crim.L.R. 51.

[6] [1955] A.C. 121; [1955] Crim.L.R. 116.

[7] [1933] 1 K.B. 529.

[8] Mayo, A. C. J., Abbot, J. and Piper, A. J

Rape and the fake ceremony of marriage

In *Papadimitropoulos*[9] the High Court of Australia[10] in a unanimous judgment, allowed an appeal against a conviction of rape. The problem raised in this trial had not previously, in this form, confronted a court anywhere in the Anglo-American legal system.

The jury convicted Papadimitropoulos of rape, presumably accepting the view of the facts advanced by the Crown that he had fraudulently misled a Greek girl, who had recently emigrated to Australia and who spoke very little English, into believing that certain formalities which they had gone through at a registry office amounted to a valid marriage ceremony. In fact, all that had happened was that they had given notice of their intention to go through such a ceremony four days later and had made an appointment for it. She gave evidence that she then consented to intercourse with the accused believing him to be her husband and that she would not otherwise have consented. They saw the Registrar in Melbourne on Thursday; the real ceremony was arranged for the following Monday. Early on Monday morning the accused left for Sydney.

The trial judge, Mr. Justice Gavan Duffy, directed the jury that rape consists in having carnal knowledge of a woman without her consent and that, in law, if the prosecutrix did believe that the accused had become her husband by marriage and acquiesced in sexual intercourse with him on that basis and would not otherwise have acquiesced, and that this belief of hers had been brought about by the accused's false representations of fact made with the intention of obtaining her consent to sexual intercourse, then there would be no consent and he should be convicted of rape. Put briefly, this amounts to the proposition that consent to matrimonial intercourse is not consent to adultery or fornication. The jury obediently convicted.

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[9] (1958) 21 Argus L.R. 21.

[10] Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

The extensive authority on consent and rape was not put to Gavan Duffy J. at the trial and, in particular, the strong dicta in *Clarence* [11] were apparently overlooked. But on appeal to the Court of Criminal Appeal all such authority was canvassed, and the conviction was upheld by Lowe and O'Bryan JJ., Monahan J. dissenting in a powerful judgment which found favour with the High Court.

The trial judge and the majority in the Court of Criminal Appeal rested their view of the law essentially on the authority of the many "personation" cases allowing convictions of rape where the accused had in the night pretended to be the husband of the prosecutrix, and on the authority of the "medical treatment" cases where the accused had persuaded the prosecutrix that what he was doing was therapy for an illness or for a defect in her singing voice. Having considered these authorities, Lowe and O'Bryan JJ. concluded [12]:

> "If it be true, as we think it is, that the consent of the woman which affords a defence to the man is a real consent—a consent both as to act of sexual intercourse and to the man involved, why should it be held to be a consent when the jury have found that the woman only consented on the representation and in the belief that the man was her husband? . . . Here, too, it may equally well be said that what the woman consented to was an act of marital intercourse and not to fornication. The application of the principle to the capacity in which the man acts seems to us but a natural application of a well understood principle to meet a new ruse of the seducer. We think we should hold, and we do hold, that what took place here constituted rape and that the trial Judge's charge was correct."

At the conclusion of their judgment and referring to the dissent of Monahan J., the majority said [13]:

> "Where we differ from our learned brother is in thinking that extra-marital intercourse be it adultery or fornication is an act essentially different from marital intercourse."

This somewhat mystical view of the differing nature or essence of marital and non-marital intercourse was rejected by the High Court. They did not phrase it this way, but, after all, as Gertrude Stein defined a rose, "A rose is a rose is a rose is a rose is a . . ."

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[11] (1888) 22 Q.B.D. 23.

[12] Transcript before the Court of Criminal Appeal, August 23, 1957, p. 15.

[13] *Ibid.*, p. 16.

The High Court summed up their analysis of the law as follows [14]:

> "To return to the central point; rape is carnal knowledge of a woman without her consent; carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is taking place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape."

Papadimitropoulos languished nearly six months in prison to win his appeal. It is hard to regret this, particularly as there would appear to have been an alternative and lesser statutory offence of which he might have been convicted, that of inducing a woman by fraud to consent to intercourse, a statutory provision based on section 3 of the English Criminal Law Amendment Act, 1885.

Larceny and cheques

In an earlier Australian Letter [15] the vast and difficult jurisdiction of Mr. Justice Kriewaldt of the Supreme Court of Northern Territory was mentioned. Recently, in Alice Springs, with inadequate library facilities for the complexity of the issue he faced, Mr. Justice Kriewaldt tried Alan Wauchope on three counts of larceny of valuable securities. He concluded that in law Wauchope must be acquitted and in a lengthy and, unfortunately, unreported judgment gave his reasons.

Wauchope had been employed as secretary to a member of the Federal House of Representatives, his salary being paid fortnightly through the Northern Territory Administration out of funds provided by the Commonwealth of Australia. In February, 1956, Wauchope resigned from this position, notifying the proper authorities in the Northern Territory Administration of this fact. Administrative incompetence led to his salary continuing to be paid; fortnightly, cheques continued to arrive addressed to Wauchope and accompanied by Advice Notes stating that the cheque enclosed was for payment of salary in respect of the fortnight before its date. This continued for sixteen months after Wauchope's resignation. Wauchope had cashed all the cheques and drunk the proceeds. Wauchope's comment on all this in the statement he gave to the police was [16]:

> "When I received the first cheque I thought it might be legitimately mine because I was not sure exactly when the

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[14] (1958) Argus L.R. 21, at p. 29.

[15] [1954] Crim.L.R. 274.

[16] p. 3 of judgment.

> appointment was terminated, but I made no endeavour to check up on this and when the next cheque came I felt that I was committed and shut my mind to the inevitable consequences. I attribute my continued offence to the fact that alcoholism had me so much in its grip that my moral sense was completely blunted. That state of affairs continued until the time of my arrest."

Mr. Justice Kriewaldt carefully analysed the " mistake " and " taking " cases but avoided applying them, disposing of the issue on another ground. Wauchope was charged with an offence under section 149 of the Criminal Law Consolidation Act, 1876, which is similar to section 46 (1) of the English Larceny Act, 1916, and which provides that " whosoever shall steal . . . any valuable security . . . shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value. . . ." Mr. Justice Kriewaldt referred to the history of this provision by which, until it was enacted, though it was possible at common law to steal a piece of paper evidencing a chose in action, it was not possible to steal the chose in action itself. He then continued:

> " It must be emphasised that the accused is not charged with the larceny of the piece of paper, nor is he charged with the larceny of the money he obtained by cashing the cheques: he is charged with the larceny of the cheque. As to the piece of paper, if he were charged with the theft of that, it may be that no offence was committed by the accused because the paper, after the cheque is cashed, will return to the drawer, and no other person has any interest in it. The drawer is therefore not permanently deprived of the paper, as paper, and hence it would not be in accordance with " the realities of the case " to say that the accused had an intention to deprive the Commonwealth of Australia permanently of the paper as paper. As to the money represented by the cheques, if the accused were charged with the theft of that, there are probably also difficulties in the way of the successful prosecution of the accused. The money which he received when he cashed the cheques, whether it consisted of coins or bank notes, was received from the bank or person with whom the accused cashed the cheques. Those coins or notes were not at the time the accused received them in the possession of the Crown and hence could not be laid as the property of the Crown. . . . I need not consider further what the position would be if the charge were of the theft of the money represented by the cheque."

Having thus disposed of the questions of larceny of the cheque as a piece of paper, and the larceny of the proceeds of the cheque, Mr. Justice Kriewaldt turned to the question of the larceny of the cheque as a chose in action, and again concluded that no crime had been committed by Wauchope. His reasoning on this was as follows:

> " . . . When the authorities in Darwin prepared a cheque payable to the order of the accused they brought into existence a document capable of becoming a chose in action, but the document was not then at once fully a chose in action. So long as a cheque remains with and under the control of the drawer there is no chose in action in existence. The cheque is then merely a document capable of becoming a chose in action. For example, if the drawer destroys the cheque while he still has it in his possession he commits no wrong. As soon as the drawer parts with possession of the cheque, the document becomes a chose in action.
>
> " When the accused opened the envelope and handled the cheque, the document at that moment at the very latest had become a chose in action. But at that moment, the moment at which the accused received the document evidencing the chose in action, it was the accused who was entitled to the possession of the rights evidenced by the cheque. It is true that his title was a defeasible title which could be defeated by the drawer of the cheque by appropriate steps, but until those steps were taken the rights in the chose in action remained in the possession and the ownership of the accused. Suppose the cheque had been stolen from the accused after he received it and before he had cashed it, clearly the thief would be guilty of the larceny of the cheque and the property in the cheque would have to be laid in the accused. The property could not be laid in the Commonwealth of Australia, because the Commonwealth, although it may have continued to be the owner of the piece of paper which evidenced the chose in action, could not be the owner or be in possession of the chose in action itself. It is a concept the law is not able to envisage that the drawer of a cheque is the owner of or that he is in possession of the rights conferred by a cheque on the payee mentioned in the cheque. The drawer, once the cheque passes out of his control, is subject to liabilities. In the very nature of things he cannot be the owner of the rights represented by the document. At best his rights are to have the rights vested in the payee cancelled. . . .
>
> " In short, when the paying authorities prepared and sent

> to the accused these cheques they brought into existence not only a piece of paper but also a chose in action. The only person who could be entitled to the rights represented by the chose in action was the accused. Until his rights were set aside, the rights were his and hence he could not " take " them from anybody else and whatever he did with the rights he did with the consent of the owner of the rights because he was the owner."

Given that Mr. Justice Kriewaldt's analysis discloses an apparent defect in the criminal law, the question remains whether or not it should be cured by legislation. A person who cashes a cheque payable to him knowing he is not entitled to the money is obviously fraudulent; but whether the criminal law should seek to protect the drawer of the cheque from his own incompetence or leave him to his civil remedies is another and a more difficult question.

Russell v. *Smith* Reconsidered

By RUPERT CROSS, B.C.L., M.A.,
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The principal objects of this article are to submit that there is room for another view concerning some of the points raised by Dr. Glanville Williams in his recent articles on mistake as to quantity in the law of larceny,[1] and to suggest that *Russell* v. *Smith*[2] is more easily reconciled with *Moynes* v. *Coopper*[3] than is sometimes supposed. It will be convenient to begin with the facts of each case.

Russell v. Smith

In *Russell* v. *Smith,* the accused was employed as a lorry driver by T., from whom he received instructions to collect a ton of meal in half-hundredweight sacks from C. and deliver it to J. Eight sacks too many were inadvertently loaded on to the lorry at C.'s premises. The accused did not discover this until he had completed the delivery of the ton of meal to J. when he forthwith decided to misappropriate the excess. The Divisional Court held him guilty of stealing eight sacks of meal from C. as there was a taking which synchronised with the formation of the *animus furandi.* The taking occurred when Smith discovered that he had the sacks "which were never intended to be given to him and which he must have known were never intended to be given to him, except in the sense that they were put on the lorry by mistake."[4] No significance was attached to the fact that Smith was a servant, and it is assumed throughout the article that he was rightly treated as an independent carrier so far as the question whether he was guilty of larceny from C. was concerned.

Moynes v. Coopper

In *Moynes* v. *Coopper,* the accused obtained from his employers an advance of £6 19s. 6½d. against his weekly wage. His employers' wages clerk did not know of the advance, and accordingly paid the accused his full week's wage of £7 3s. 4d. The money was handed over in a pay packet, and the accused did not discover the mistake until some time later, when he immediately decided to misappropriate the excess payment. It was held in the Divisional Court by a majority (affirming the decision of the Appeals Committee of Quarter Sessions by which Moynes's conviction had been quashed) that the accused was not guilty of stealing £6 19s. 6½d. from his employers. To quote the words of Lord Goddard C.J. when discussing *Moynes* v. *Coopper* in *Russell* v. *Smith*, "It was not that the clerk put some money into the pay packet by mistake, thinking, for instance, that she had put in £5 when in fact she had put in £6. . . . What he (the accused) took was what the clerk meant him to take."[5]

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[1] [1958] Crim.L.R. 221, 307.
[2] [1958] 1 Q.B. 27; [1957] Crim. L.R. 610.
[3] [1956] 1 Q.B. 439; [1956] Crim. L.R. 268.
[4] Lord Goddard, C.J., [1958] 1 Q.B. 27 at p. 35.

Two problems raised by *Russell* v. *Smith* are first, how could it be said that all the ingredients of the definition of stealing applied to the eight sacks left over after the ton of meal had been delivered to J.? Secondly, how could it be said that Smith did not have lawful possession of these sacks from the moment when they were placed upon the lorry a considerable time before he formed the *animus furandi* with regard to them? The first may be described as the problem of identification, the second as the problem of possession. They overlap to some extent, but they will be discussed separately and the discussion of the second will show how it is thought that the two cases which have been mentioned may be reconciled. For the sake of completeness, a brief reference will then be made to *R.* v. *Tideswell*[6] and *R.* v. *Middleton*,[7] each of which is mentioned by Dr. Williams in connection with the problem of identification.

The problem of identification

Before considering this problem in relation to *Russell* v. *Smith*, it will be convenient to deal with the matter in more general terms. Dr. Williams does not deny that a conviction of larceny of the excess will be justified in some cases of mistake as to quantity, but he contends that this is not the case if the individual items making up the quantity are indistinguishable from each other.[8] If A asks B for ten shillings' worth of coppers in return for a ten-shilling note, knowing that the envelope which B hands him contains a half-crown in addition to 120 pennies, A could no doubt be convicted of larceny of B's half-crown. If A were not to discover B's mistake until some time after the delivery of the envelope, the only question would be whether there had been a taking of the half-crown at the time of the formation of the felonious intent. In other words, the problem would relate to the doctrine of possession—did A have possession of the half-crown before he became aware of its existence?

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[5] [1958] 1 Q.B. 33.

[6] [1905] 2 K.B. 273.

[7] (1873) 2 C.C.R. 38.

[8] *Ante*, p. 307.

Subject to such questions of possession, it is submitted that a conviction of larceny of the excess can be supported even when the individual items making up the quantity are indistinguishable from each other. The contention is that Dr. Williams's articles fail to make allowance for the conception of A's expressly or impliedly conferring on B a power of selecting a portion of a larger quantity of identical items owned by A. Once this power has been exercised it becomes possible to say whether B has taken possession of any part of the larger quantity without A's consent, and he is guilty of larceny at that time if the other requirements of the definition of the offence are satisfied. The contention must now be clarified by means of some concrete examples.

Suppose a shopkeeper owes A £5, and says to him " you may take the £5 I owe you out of my till." The till contains many pound notes and A takes six of them. If we seek to apply the definition of stealing contained in section 1 of the Larceny Act, 1916, we must ask whether there is any one of those six pound notes of which it can be said that, without the consent of the owner, fraudulently and without a claim of right made in good faith, A took and carried it away, with intent at the time of such taking permanently to deprive the owner thereof. A took and carried away all six notes with that intention. He did this, so far as one of them was concerned, without the consent of the shopkeeper. It is impossible to say which note was taken without such consent. All that can be proved is that A was expressly given the power of selecting five pound notes from a larger quantity and, as he took six, he exceeded this power with regard to one note. It is also true to say that, of the six notes taken and carried away by A with the intention of permanently depriving the owner, one was taken fraudulently, and without a claim of right made in good faith, because there was one note in respect of which A exceeded his power of selection. Although it is impossible to say which note was taken without the shopkeeper's consent or which was taken fraudulently and without a claim of right, it can be truly asserted that the note taken fraudulently and without a claim of right is the same as that which was taken without consent because, of the six notes taken by A, there was one, and only one, in respect of which he exceeded his power of selection. This would appear to be an adequate answer to the problem of identification.

The case would be the same if the shopkeeper handed A a wad of notes saying " here are six pound notes, take five and leave the sixth on the counter." Should A make off with all six, he would be guilty of larceny of one note because the shopkeeper intended that A should merely have the custody of the six notes while selecting the five of which he would assume possession. By taking possession of all six, A would have exceeded his power of selection in the case of one note and that note would have been taken without the shopkeeper's consent.

Does it make any difference if the shopkeeper believes a wad to consist of five pound notes and hands it to A who knows it contains six? The case might be distinguished from that given in the last paragraph because there is a sense in which it is true to say that the shopkeeper consents to A's possession of the entire wad. There is a lot to be said for this approach. but it is too late to argue that the physical delivery of goods or money by one person to another necessarily prevents that other from being guilty of theft on account of his dishonest assumption of possession. In law, the shopkeeper did not consent to part with possession of one of the six notes handed to A. A was aware of the mistake and, at the moment of delivery, had a power of selecting five notes in payment of the debt. He exceeded his power with regard to one, and that must necessarily have been the note in respect of which the shopkeeper did not consent to A's possession. That which must in law be treated as a consent to the appropriation of any five out of six notes to the payment of a debt, cannot be extended to the appropriation of the sixth to the creditor's other purposes. Granted that, from the moment of delivery, A acts fraudulently with regard to one note, that must be the note, and the only one of the six, of which he takes possession without the shopkeeper's consent.

When discussing a similar example, Dr. Williams maintains that it cannot be said that any particular one of the notes was taken without the prosecutor's consent.[9] If this, like similar observations made by Dr. Williams throughout his two articles, means that there can be no conviction of larceny unless the prosecutor is, in principle, able to produce the very note alleged to have been stolen, as he can, in principle, in the ordinary case of the theft of a banknote which has been lost, spent or mixed with others after the taking, it is submitted that the requirement is not necessitated by any doctrine of common sense, criminal law or procedure. If the prosecutor can in principle, produce six notes and prove that all the ingredients of the definition of stealing must apply to one of them, surely the theft of a banknote, the property of the prosecutor has been established. No further process of identification is either possible or necessary.

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[9] *Ante*, p. 224.

To revert to our hypothetical case, suppose the shopkeeper were to hand A a wad consisting of six pound notes in payment of a debt of £5, and both believe that there are only five notes in the wad. What is the position if A discovers the mistake some time later and instantly decides to spend all six pounds? So far as the problem of identification is concerned, it seems that the position is the same as it was in the case in which A knew of the shopkeeper's mistake at the moment of physical delivery. As soon as he discovers the mistake, A has the power to appropriate five out of the six notes. He exceeds this power in the case of one note and, in law, he has not got the shopkeeper's consent to do so. Therefore he has, without the consent of the owner, fraudulently, and without a claim of right made in good faith, formed the intention of permanently depriving the owner of one banknote. Has he taken the note and carried it away? We need not worry about the carrying away because that must accompany or follow the change of possession constituted by the taking which might even be treated as a continuing act on the principle of *R.* v. *Riley*.[10] The answer to the question whether there was a taking depends on the answer to the question whether A had lawful possession of the note when he discovered the mistake. If he did, he cannot have taken the note at that time; if, on the other hand, there was a taking, all the ingredients of the definition of stealing are satisfied so far as one banknote is concerned.

It is time to apply the foregoing discussion to the facts of *Russell* v. *Smith*. When Smith drove the lorry away from C's premises, he had physical control of forty-eight sacks owned by C. Among those forty-eight sacks were eight (it is impossible to say which eight) with regard to which neither C nor Smith had assented to Smith's possession of them. If he had become aware of the presence of forty-eight instead of forty sacks on the lorry before, or at the time of, the delivery to J., Smith would have had the power to choose which of the sacks to pass on to J. All that could be said of the residue would have been that they were in his control without C.'s consent. The fact that, in the actual case, Smith was unaware of his power of selection cannot alter the fact that, after the delivery of the ton of meal to J., the lorry contained eight sacks owned by C., and, in the eye of the law, they were there without C.'s consent. If Smith had not already got lawful possession of these sacks, there can be no doubt about the propriety of his conviction. C. had consented to his possession as carrier of forty out of the forty-eight sacks on the lorry, and Smith was authorised to deliver any forty of those sacks to J. Having acted in accordance with this authority, he would, on the assumption that he had not already got lawful possession, have taken eight sacks feloniously and without C.'s consent. The eight sacks in respect of which C. did not consent to Smith's possession became identified after the delivery of the remaining forty.

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[10] (1853) Dears. 149.

There is thus no difficulty in Smith's conviction so far as the problem of identification is concerned, and the problem of possession must now be considered.

The problem of possession

The question whether Smith had lawful possession of the eight sacks in respect of which he was convicted before he formed the felonious intent may be approached by means of a reference to two comparatively simple points. The first is that no problem of possession arises when ownership has passed to the accused. The second point is that the criteria for determining whether a person has got possession differ according to the branch of the law of larceny which is under consideration. That which gives a man such possession of the thing alleged to have been stolen as will support an indictment in which the property is laid in him is not necessarily the same as that which gives someone who is not a bailee such lawful possession as will immunise him from a successful charge of larceny if he forms the felonious intent some time later.

No problem of possession when property passes

To enlarge upon the first point, let us assume that there has been an ostensible delivery from A to B. The first question to be asked on an issue concerning B's liability for stealing is whether there is any sense in which it is true to say that A did not consent to being permanently deprived by B of the thing alleged to have been stolen. If the answer to this question is in the negative, B cannot be guilty of larceny and it is unnecessary to go into niceties concerning the exact moment at which he got possession. Such niceties become all important if the answer to the above question is in the affirmative either because there is a sense in which it is true to say that A did not consent to being deprived by B as he intended to make delivery to someone else,[11] or, alternatively, because there is a sense in which it is true to say that A did not consent to being deprived of the particular thing on account of his ignorance of its existence,[12] or mistake as to its identity.[13]

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[11] *R.* v. *Hudson* [1943] K.B. 458.

[12] *Merry* v. *Green* (1841) 7 M. & W. 623.

[13] *R.* v. *Ashwell* (1885) 16 Q.B.D. 190.

Moynes v. *Coopper*

If the above question is raised with regard to *Moynes* v. *Coopper*, the answer must be in the negative. On the view taken by the majority of the Divisional Court, the wages clerk had authority to calculate the sums due to an employee and pay them to him. What the accused took was " what the clerk meant him to take " as Lord Goddard C.J. put it. Even if the accused had been aware of the overpayment at the time of delivery, he ought not to have been convicted of theft because the property in the money would have passed to him. This was the view of the chairman of the Appeals Committee of Quarter Sessions, but the Divisional Court left the point open. The *ratio decidendi* was that there was no taking. As Moynes did not know of the overpayment when the envelope was handed to him, he did not obtain the possession of its contents under a mistake [14] on the part of the owner with knowledge that possession had been so obtained. This involves the conclusion that Moynes had lawful possession of the entire contents before he became aware of their existence, otherwise the court would have considered the question whether there was a taking when he found out about the overpayment. Provided the owner intends that the thing should pass into the transferee's possession, his consent gives possession of the thing transferred, although the transferee was unaware of the thing's existence at the time of the transfer. If the owner's consent is not affected by some such vitiating factor as a trick or mistake, the transferee's possession is lawful. It renders the possessor who forms the felonious intent after the transfer immune from a successful charge of larceny unless he is a bailee, and Moynes was not a bailee.

Different criteria for determining possession

Lawful possession is also acquired by a finder, provided he does not instantly form the *animus furandi,* but the very conception of finding involves knowledge of the existence of that which is found. Only when there has been a consensual transfer to him, can someone who has had control of a thing without knowledge of its existence plead in answer to a charge of larceny that he had lawful possession before he formed the felonious intent. Neither knowledge on the part of the person with control, nor the consent of the transferor, is essential to the acquisition of that kind of possession which will support an indictment. Control over the place where the thing is suffices for this purpose. The distinction between these two kinds of possession is implicit in the decided cases[15] and in the phraseology of section 1 of the Larceny Act, 1916.[16] It is submitted that the distinction solves the problem of possession which is raised by *Russell* v. *Smith*.

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[14] Larceny Act, 1916, s. 1 (2) (i) (c).

Smith had the same degree of control over all the forty-eight sacks on the lorry, and there can be little doubt that the property in any one of them could have been laid in him if someone else had stolen it; but, so far as eight of the sacks were concerned, he was unaware of their existence and C. had not consented to his possessing them. There were thus eight sacks of which he had not got such possession as would provide him with a defence to a charge of larceny in the event of his deciding to misappropriate them. He was a bailee of any forty of the forty-eight sacks which he chose to appropriate to the bailment. It would be absurd to say that forty-eight sacks were included in the bailment for, if Smith had dishonestly sold the entire load without counting its contents, he could only have been properly convicted of larceny as a bailee of forty, not forty-eight sacks.[17] The eight sacks excluded from the bailment were identified after the delivery of the meal to J. Smith was then in a position to assume lawful possession of them as an honest finder, to abandon them (in which case his civil liability would depend on such duties as are imposed on an involuntary bailee) or to misappropriate them. He chose the last of these courses, and he was convicted as the case was very much akin to larceny by finding. In *Moynes* v. *Coopper*, the accused did not obtain possession by finding, but by delivery at a time when he had not got the *animus furandi*. Therefore, there was no taking in *Moynes* v. *Coopper*, while there was what amounted to a taking by finding in *Russell* v. *Smith*. The fact that the moral blameworthiness of the conduct of the two accused was the same in each case does not affect the legal distinction which exists between them, although it raises the gravest doubts concerning the rationality of this branch of the law.

R. v. Tideswell and R. v. Middleton

In *R*. v. *Tideswell*[18] the accused was in the habit of buying ashes from a company at a fixed rate per ton, and the ashes were weighed by the company's weigher. Acting in collusion with the accused, he supplied him with more ashes than were charged for in the company's books, and the accused was held guilty of larceny of the excess. He was a principal in the second degree to the theft of the excess by the weigher or a joint principal with him. The case does not appear to present much difficulty from the point of view of the problem of identification, and the Court for Crown Cases Reserved made short shrift of the point. The weigher was authorised to deliver a quantity of ashes to the accused. He exceeded that authority so far as a portion was concerned. It was not possible to identify the ashes in respect of which he acted without authority; but it was clear that, of the ashes received by the accused, a portion was delivered to him by the weigher without the company's consent, and the remaining ingredients of the definition of stealing were satisfied by the weigher's conduct with regard to that portion.

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[15] Contrast *R*. v. *Roe* (1859) Bell 93 and *Hibbert* v. *McKiernan* [1948] 2 K.B. 142, deciding that knowledge of the specific thing's existence on the part of the person in whom the property is laid is not essential, with *Merry* v. *Green* (1841) 7 M. & W. 623, and *R*. v. *Hudson* [1943] K.B. 458, deciding that the accused takes a thing when he knows that he has got it.

[16] Contrast the definition of owner in s. 1 (2) (iii) with the definition of "takes" in s. 1 (2) (i).

[17] *R*. v. *Ashwell*, 16 Q.B.D. 190 could be cited as authority against holding Smith guilty of larceny as a bailee from C.

[18] [1905] 2 K.B. 273.

In *R.* v. *Middleton* [19] a post office clerk consulted a letter of advice relating to a notice of withdrawal of £8 16s. 10d. due to a depositor with the savings bank. The clerk placed this sum on the counter instead of ten shillings, the amount mentioned in Middleton's notice of withdrawal. Middleton was aware of the mistake and instantly made off with the larger sum. He was convicted of stealing £8 16s. 10d., the property of the Postmaster-General, and his conviction was affirmed by a majority of the Court for Crown Cases Reserved. The only allusion to the problem of identification was contained in the dissenting judgment of Cleasby B., but the case is of great interest in this connection. There is certainly a sense in which it is true to say that the clerk did not consent to the accused's receiving any part of the £8 16s. 10d. because he believed that he was delivering the coins to another depositor. Subject to the question of consent, which was the main concern of the judgments, all the ingredients of the definition of stealing applied to Middleton's conduct in relation to the entire sum, except that it might have been contended that he did not take all the money without a claim of right made in good faith. This would have raised a problem which is not fully considered by the authorities—the precise significance of the requirement of good faith. According to the eleventh edition of *Russell*,[20] the prisoner must have "had an honest belief in the existence of his right to take the goods in the manner and circumstances in which he did take them." It is hard to think that Middleton, who knew that none of the money was meant for him, entertained such a belief, even with regard to 10s. Accordingly, it is doubtful whether there is any substance in the point that he did not take the entire £8 16s. 10d. without a claim of right because he was owed 10s. by the Postmaster General. But the existence of the possibility of this argument which was not fully explored by the court certainly makes *Middleton's* case the most difficult of the authorities mentioned by Dr. Williams so far as the problem of identification is concerned. If the prosecution had, in effect, conceded that there was no larceny of 10s. by charging the accused with the theft of £8 6s. 10d. there would have been some difficulty in proving that all the ingredients of the definition of the offence applied to the appropriate portion of the money taken by the accused. A half-sovereign was placed on the counter, but it would have been hard to isolate that as the coin to which the claim of right attached. Where there is larceny owing to the owner's mistake as to the identity of the person to whom a quantity of similar items is transferred, the accused should be indicted with the theft of the entire amount. This procedure is not possible when the mistake concerns the number of items transferred because the owner validly consents to the delivery of a portion of them.

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[19] (1873) 2 C.C.R. 38.

[20] At p. 1156.

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Rupert Cross

1958

Practice and Procedure

Licensing justices

Licensing—adequacy of notices (*Licensing Act*, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 5 (1) *and Sched.* 3).

At the meeting of the confirming authority for the county borough of Walsall on April 17, 1958, Robert Arnold Hildick applied for the confirmation of the grant of a beer, wines and spirits "off" licence in respect of premises at 13 Union Street, Walsall, made by the licensing justices for the borough on March 6, 1958, at the second session of the general annual licensing meeting. An objection to the confirmation was made on behalf of Gordon Dawson, a licensee, on the ground that the notices required to be kept affixed between 10 in the morning and 5 in the afternoon of two consecutive Sundays to "the door, or some public and conspicuous place near the door, of the church or chapel of the parish or place where the premises are situated" had not been affixed to the door of the correct parish church but had been affixed to the door of the church of an adjoining parish in the same county borough. This was proved to be so. It was contended on behalf of the applicant that the word "place" in the section was sufficiently wide to include the parish church of a neighbouring parish and reference was made to *R.* v. *Smethwick Confirming Authority, ex p. Holt Brewery Co.* (1929) 45 T.L.R. 530.

Held, that the notices had not been adequately displayed and that the statute had not been complied with and confirmation of the grant would be refused. [C. L. HODGKINSON & BENTON, Solicitors, Walsall.]

Central Criminal Court

*Committal for statutory offence—indictment at common law—joinder of accused—decision on objection to evidence before opening.**

In R. *v.* ADLER AND OTHERS (Central Criminal Court, June 16, 1958) A., G. and E. having claimed to be tried by jury were committed for trial under the Betting Act, 1853. The indictment as drawn contained only one count of keeping a common gaming house, the particulars being that they "on divers days between the 26th day of March and the 1st day of May, 1958, in the City of London for gain kept and maintained a common gaming house or gaming room at the Somerset Hall Working Men's Club." His Honour Judge Aarvold quashed this indictment on a preliminary objection on the grounds that the defendants having elected to go for trial for a statutory offence with a limited penalty should not be put in danger of an unlimited punishment for the common law offence.[1]

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* For the prosecution: *Edward Clarke* (instructed by The Comptroller and City Solicitor). For Adler: *S. J. R. Craig* (instructed by Fine & Co.). For Gittleson: *P. Bloomfield* (instructed by Adler and Adler). For Elbon: *L. Caplan, Q.C.*, and *M. Levene* (instructed by Fine & Co.).

Later in a Voluntary Bill the three defendants were charged in separate counts under section 3 of the Betting Act, 1853: (1) A. on April 30, 1958, in the City of London having the care and management of the Somerset House Club used for the purpose of persons using the same betting with persons resorting thereto (2) C. on April 30, 1958, in the said City being a person using the Somerset House Club did use it for the purpose of betting with persons resorting thereto (3) E. on April 30, 1958, in the said City being the owner of the Somerset House Club knowingly and wilfully permitted the same to be used by other persons for the purpose of betting with persons resorting thereto.

On a preliminary objection that the three defendants were wrongly joined in one indictment Judge Aarvold ruled that the common factor of the premises provided a sufficient nexus between the counts. The defence then intimated that they would object to all evidence of police observation except that regarding the date charged in the indictment. The prosecution asked that the question of admissibility of evidence of observation on other days be decided at once as it would be virtually impossible to open the case to the jury without referring to such evidence. Judge Aarvold decided that in the circumstances he should consider the question forthwith and ruled that such evidence was admissible as tending to prove system. [C. B. O.]

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[1] *R.* v. *Phillips* (1953) 37 Cr.App.R. 65 and *R.* v. *Brown* [1895] 1 Q.B. 119 (to the contrary, not cited in *R.* v. *Phillips*).

Summary Justice

False pretences

For obtaining food and drugs worth £2 from a hospital by pretending to be ill John Sherratt, aged 32, was sentenced to six months' imprisonment. He asked for nine similar cases to be taken into consideration. The other cases involved a total of £57 11s. 10d. worth of drugs and food: Melton Mowbray Magistrates' Court (*Manchester Guardian*, July 2).

Road traffic

For driving without due care and attention, contrary to section 12 (1) of the Road Traffic Act, 1930, a motor-cyclist was fined £3. The motor-cyclist was controlling the machine with one hand and eating a Cornish pasty with the other: every time he took a bite his motor-cycle swerved: Plymouth Magistrates' Court (66 *Police Review* 428).

Case and Comment *

BORSTAL TRAINING

Guidance on the desirability of imposing second or subsequent sentences of Borstal training

R. v. Noseda and others

Court of Criminal Appeal: Lord Goddard C.J., Barry and Ashworth JJ.: June 23.[1]

N. and others appealed from sentences of Borstal training. In each case a similar order had been made by a court on a previous occasion. On the question of the desirability of imposing second or subsequent sentences of Borstal training the Court of Criminal Appeal laid down the following principle for guidance:

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] The appellants did not appear and were not represented. The Crown was not represented.

Each case must be considered on its own facts and there was no principle applicable to all cases under which such sentences were to be regarded as appropriate or inappropriate; but the occasions on which a third sentence was appropriate were likely to be rare. The offender might be (a) a person released from Borstal on licence, or (b) an absconder from Borstal, or (c) a person who remained absent without leave from Borstal, for example, after a visit to his home. As to a person in class (a), he might fairly be said to have shown some response to training. He was still liable to be recalled to Borstal under section 45 (3) of the Prison Act, 1952, at any time up to four years from the date of his sentence; and he might then be detained up to three years from the date of his sentence or six months from the date when he was taken into custody under the order of recall, whichever was the later. It was important that, where such a person committed an offence whilst on licence, the court should know what period of his original training was outstanding and whether he would in fact be recalled to Borstal. The practice of the prison commissioners was to recall such an offender unless the court imposed a fresh sentence of Borstal or a substantial sentence of imprisonment. As a general rule the appropriate sentence to be imposed upon such an offender was a short term of imprisonment with a view to recall to Borstal. In passing sentence, the court should make it clear that recall to Borstal was intended. Such a sentence would not, however, be appropriate where the prison commissioners indicated that the offender would not be recalled to Borstal, nor where the nature of the further offence was so serious as to call for a substantial sentence. On the other hand, if the commissioners reported that the offender appeared to need a longer training than the remaining part of his sentence would provide, a further sentence of Borstal might be appropriate. As to a person in class (b), the fact that a person absconded from Borstal indicated his unwillingness to respond to the training, but was not of itself a valid reason why he should not be required to submit to it. If the absconding and further offence took place early in the training, say within the first twelve months or so, a short term of imprisonment with a view to recall would be desirable; but if the absconding were later in the training, the court or the prison commissioners might take the view that further training was unlikely to be of benefit and, accordingly, that imprisonment was the only alternative. As to a person in class (c), a person who was absent without leave from Borstal and who committed a further offence should ordinarily be treated as an absconder. [H. P.]

CERTIORARI

Magistrates' Courts Act, 1957—absence of defendant—disqualification from driving

R. v. Totton JJ., ex p. McDiarmant

Queen's Bench Divisional Court: Lord Goddard C.J., Barry and Havers JJ.: *The Times*, June 4.[2]

D. was served with a summons alleging that he had exceeded the speed limit in a built-up area. D., availing himself of the provisions of section 1 of the Magistrates' Courts Act, 1957, informed the court that he did not propose to appear at the hearing and that he intended to plead guilty. When the summons was heard by the justices they imposed a fine, and, because of his previous convictions, disqualified him from driving for three months.

Section 1 (2) (iii) of the Magistrates' Courts Act, 1957, provides: " If the court proceeds under this subsection to hear and dispose of the case in the absence of the accused the court . . . shall not without adjourning under . . . subsection (3) [of section 14 of the Magistrates' Courts Act, 1952,] sentence him to any term of imprisonment or to any other form of detention, or order him to be subject to any disqualification."

D. moved for an order of *certiorari* to bring up and quash that part of the conviction which related to the disqualification on the ground that the justices had no jurisdiction to make the order of disqualification in D.'s absence without giving him an opportunity to attend the court.

Held, that since the justices did not adjourn and give D. an opportunity to appear before them, that part of the conviction ordering the disqualification must be quashed.

Per curiam: Since D. was getting off the disqualification, he must bear the costs of the motion. [D. C.]

Commentary. The Magistrates' Courts Act, 1957, made it possible, for the first time, for persons charged with summary offences to plead guilty without appearing before the court. It is obviously undesirable, however, that a man should be sentenced to serious punishment in his absence and therefore section 1 (2) (iii) makes the above provision for adjournment.

Section 14 of the Magistrates' Courts Act, 1952, provides that the court may at any time adjourn the trial, and may either fix the time and place at which the trial is to be resumed then, or leave it to be determined later; " but the trial shall not be resumed at that time and place unless the court is satisfied that the parties have had adequate notice thereof."

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[2] For D: *Cecil Binney* (instructed by Amery-Parkes & Co.). The justices did not appear and were not represented.

When the adjournment takes place under section 1 of the Magistrates' Courts Act, 1957, the notice must give the reason for the adjournment.

EVIDENCE

Capital murder—alleged date of victim's death—duty of prosecution in regard to witnesses whom they do not believe

R. v. Collier

Court of Criminal Appeal: Lord Goddard C.J., Slade and Devlin JJ.: *The Times,* June 24, 1958.[3]

C. was convicted at the Central Criminal Court of capital murder. The case for the prosecution was that the deceased was killed in the course or furtherance of theft. The date when the deceased was killed, which was based partly on medical evidence and partly on statements made by the accused, was put by the prosecution at about October 6. C., in one of his statements to the police, had said that there was a woman who had seen the deceased alive on October 22, that is, sixteen days after the alleged date of the murder, and also that a police constable had seen the deceased at about the same time. The prosecution did not call either of the witnesses at the trial. On appeal to the Court of Criminal Appeal, C. contended, *inter alia,* that because the matter of the date of the death was of crucial importance the prosecution ought to have called these witnesses.

Held, dismissing the appeal, that the duty of the prosecution in such circumstances had been clearly laid down on previous occasions. If in the course of their inquiries they obtained evidence of this sort, which in their judgment did not reveal the truth, they were not entitled merely to suppress it; it was their duty to inform the defence of the names and addresses of the witnesses concerned so that the defence had the opportunity of calling the witnesses before the court. The prosecution were not obliged to call the witnesses themselves, and it would put them in an impossible position if they were obliged to call witnesses whom they did not believe to be witnesses of truth. The fact that the matter was of crucial importance made no difference; the duty was the same as regards any material evidence and the degree of significance did not affect the duty one way or the other. [H. P.]

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[3] For the appellant: *Victor Durand, Q.C., David Tudor-Price* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Christmas Humphreys, Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions).

Commentary. The prosecution's duty is limited to making the witness whom they do not wish to call available to the defence and they are not under the further obligation of supplying the defence with a copy of the statement which they have taken: *R.* v. *Bryant* (1946) 31 Cr.App.R. 146.

FRAUDULENT CONVERSION

Deposits on houses converted—whether payer of the money or the vendor of the house defrauded

R. v. Pilkington

Court of Criminal Appeal: Lord Goddard C.J., Slade and Devlin JJ.: June 23.[4]

P. was convicted at the Central Criminal Court of receiving money and fraudulently converting it to his own use. The case for the prosecution was that P. had taken deposits from persons wishing to buy houses and had put the money into his own pocket. The indictment stated the payer as the person defrauded. On appeal to the Court of Criminal Appeal, P. contended that the person defrauded was not the payer but the vendor on whose behalf the money was received.

Held, dismissing the appeal, that it was a question for the jury to decide upon what terms the money had been paid to P. There was ample evidence to support the finding of the jury that the payers of the money had been defrauded. [H. P.]

Commentary. The point taken was a very technical one, as it appears clear that P. was guilty of fraudulent conversion as against *someone* and the only question was whether the purchaser of the house was a person defrauded. It would seem that he was defrauded if the act of the agent was detrimental to his interests (*cf. R.* v. *Bassey* (1931) 22 Cr.App.R. 160). Did he retain any interest in the money after it had been handed to P? The answer to this question would seem to depend on the principle stated by Bowen L.J. in *Ellis* v. *Goulton* [1893] 1 Q.B. 350, 352: " When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any trust in relation to the payer."

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[4] For the appellant: *W. D. M. Summer, J. H. E. Mendl* (instructed by R. W. Platt). For the Crown: *Christmas Humphreys, J. H. Buzzard, Jean Southworth* (instructed by the Director of Public Prosecutions).

The court held that there was evidence that P. received the money as stakeholder and not as agent for the vendor and, therefore, that he was properly charged with having converted property received for or on account of the purchaser.

GAMING

Using premises for unlawful gaming—chemin de fer—common gaming house

R. v. Aspinall and others

London Sessions: Mr. Frank Cassels, Deputy Chairman, March 18, 19.[5]

The accused Aspinall and Burke were charged on indictment with using a room for the purpose of unlawful gaming, Aspinall also being charged with assisting in conducting the business of unlawful gaming and Osborne was charged with being the occupier of a room permitting the same to be used for unlawful gaming, all contrary to section 4 of the Gaming Houses Act, 1854.

The evidence was that on two occasions during three observations in December and January, 1958, a gaming party was being held at a flat occupied by the defendant Lady Osborne, the mother of the defendant Aspinall. On the second occasion the flat was entered on a warrant by the police, and it was found that the game of chemin de fer was being played.

In withdrawing the case from the jury, Mr. Cassels held that (1) chemin de fer was not one of the games made unlawful by statute and was not therefore unlawful *per se*, and that (2) in order that a lawful game be made the subject of unlawful gaming it was necessary that it should be played in a common gaming house, and that on the evidence a private party on two separate occasions a month apart could not be said to constitute habitual user so as to make this room a common gaming house, added to which there was evidence of genuine residential user by the defendant Osborne.

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[5] For the prosecution: *Sebag Shaw* (instructed by Commissioner Metropolitan Police). For Aspinall and Burke: *Gilbert Beyfus* and *W. Rees-Davies*. For Lady Osborne: *H. Seighart* (instructed by Theodore Goddard & Co.).

The defendants were accordingly found not guilty by direction and discharged. [C. E. S. HORSFORD, *Barrister-at-Law.*]

Commentary. Gaming is the playing of any game for money. Not all gaming is illegal. " Unlawful games " fall into two classes. First those which are forbidden by name and to the gaming at which a penalty is attached. These games—many of which are obsolete—include ace of hearts, pharaoh, basset and hazard and all games played with dice except backgammon. The second class is only unlawful in the sense that the keeping of houses for playing these games, and the playing of them in a house so kept, is made illegal, by the Unlawful Games Act of 1541. This Act apparently applies to all card games except games of mere skill. Bridge may perhaps be a game of mere skill (*cf.* Macnaghten J. in *Woolf* v. *Freeman* [1937] 1 All E.R. 178, 181), though it would seem more accurate to say that it is a game of chance and skill combined, in which case it is unlawful under the Act.) Chemin de fer falls into the second class: *Fairtlough* v. *Whitmore* (1895) 64 L.J.Ch. 386, an action by a landlord for an injunction, in which Stirling J. held that to permit chemin de fer to be played in a certain club was a contravention of a covenant so to carry on the club " as not to contravene any laws of the land for the time being in force."

It was held in *R.* v. *Davies* [1897] 2 Q.B. 199 that a person does not commit an offence against section 4 of the Gaming Houses Act, 1854, if he and his friends occasionally and casually play games in his house even if those games are unlawful in the second sense. The present case would seem to fall within that rule. " A common gaming house is . . . . a house in which a large number of persons are invited habitually to congregate for the purpose of gaming.": *Jenks* v. *Turpin* (1884) 13 Q.B.D. 505, 516, per Hawkins J.

The Report of the Royal Commission on Betting, Lotteries and Gaming (Cmd. 8190, 1951) pointed out that the law relating to gaming depends on no less than fifteen statutes in force, seven bearing dates earlier than 1819. Commentators on this case have rightly remarked in the press that a revision of the law is long overdue.

MAGISTRATES' COURTS

Magistrates' Courts Act, 1957—disqualification from driving in absence of defendant

See R. *v.* TOTTON JJ., *Ex p.* MCDIARMANT, p. 543, *ante.*

MURDER

Evidence—alleged date of victim's death—duty of prosecution in regard to witnesses whom they do not believe

See R. *v.* COLLIER, p. 544, *ante.*

PRIVY COUNCIL

Ceylon Criminal Procedure Code—false evidence—summary power to commit to prison for contempt of court

Samaratunga v. R.

Privy Council: Viscount Simonds, Lords Cohen, Keith and Somervell, Rt. Hon. L. M. D. de Silva: April 23, June 3.[6]

X was charged with aiding and abetting an attempted murder. During X's trial Y gave evidence. X was acquitted. Y was thereafter charged with having given false evidence during X's trial, contrary to section 439 (1) of the Ceylon Criminal Procedure Code. To this charge Y pleaded guilty. In determining the appropriate sentence to be passed on Y the commissioner of assize of the Supreme Court of Ceylon called X as a witness. X accordingly gave evidence. The commissioner was of the opinion that, in giving that evidence, X had deliberately lied. The commissioner thereupon summarily sentenced X to three months' rigorous imprisonment, in purported pursuance of section 440 of the Ceylon Criminal Procedure Code.

Section 440 of the Code provides: "If any person giving evidence . . . in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of the court to imprisonment . . . for any period not exceeding three months. . . ."

Held, on appeal to the Privy Council, that the commissioner was entitled to act under section 440 of the Code and that he had acted rightly.

Per curiam: The summary power conferred by section 440 of the Code is one which, from its very nature, should only be used when the judge is clear beyond doubt that the witness has given false evidence: *Subramaniam* v. *R.* [1956] 1 W.L.R. 456. Subject to this overriding principle, " the legislature has left the courts quite free as a matter of law to deal under that section with any form of 'false evidence' within the meaning of section 188 of the Penal Code, and if we attempt to fetter that discretion by rigid general rules as to the class of cases in which it may or may not be exercised, we shall be . . . running the risk of paralysing the operation of a statutory power, the maintenance of which in full working order is essential to the administration of justice in [Ceylon] . . . and we have every right to consider ourselves . . . [entitled] to inquire whether this statutory power can be safely exercised in any particular case": *per* Wood Renton C.J. in *Banda* v. *Sada* (1914) 17 C.N.L.R. 510, 512. [D. C.]

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[6] For X: *Dingle Foot Q.C., Joseph Dean* and *D. Phillips* (instructed by Graham Page & Co.) For the Crown: *T. O. Kellock* (instructed by T. L. Wilson & Co.)

Commentary. "No person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him": *Re Pollard* (1868) L.R. 2 P.C. 106, 120. It would appear that this rule applies to a statutory power of committal, such as that in question in the present case, in order to give an opportunity for explanation and possibly the correction of misapprehension as to what had been in fact said or meant: *Chang Hang Kiu* v. *Piggott* [1909] A.C. 312. It is not necessary to formulate a series of specific allegations of perjury, but it is enough if the gist of the accusation is made clear to the witness who is committed.

RECEIVING

Evidence of previous conviction—notice

R. v. Auton

County of Southampton Quarter Sessions: The Hon. E. E. S. Montagu, Esq., C.B.E., Q.C., Chairman: June 24.[7]

By proviso (i) to section 43 (1) (*b*) of the Larceny Act, 1916, a previous conviction involving fraud or dishonesty may not be proved unless "seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given." Seven days' notice was given of intention to prove such a conviction "at the hearing at Aldershot Magistrates' Court." The evidence to which the notice referred appeared in the depositions. No further notice was served. At the trial at quarter sessions the defendant argued that the evidence was inadmissible because the notice was not a notice of intention to prove the conviction at quarter sessions and that no notice complying with proviso (i) had been served.

Held, that sufficient notice had been given.

[Charles Fay, *Barrister-at-Law.*]

Commentary. Although the court appeared to place some reliance upon the fact that the evidence appeared in the depositions, this was probably a decision that the original notice was itself sufficient for the purpose of quarter sessions. It seems that the question would not have arisen if the notice had merely stated an intention to prove the previous conviction "at the trial": The better practice is either to use this less particular form of words or to serve a fresh notice relating to the hearing at quarter sessions.

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[7] For the Crown: *Norman Brodrick* (instructed by Foster, Wells & Coggins, Aldershot). For the defendant: *I. A. R. Kennedy* (instructed by Tanner & Co., Aldershot).

On the effect of section 43 (1) (*b*), see *R.* v. *Turner* [1957] Crim.L.R. 474, where the Assistant Recorder of Sheffield held that the court had a discretion whether to admit the evidence of the previous conviction. In *R.* v. *Auton* it was admitted that the court had such a discretion, and the evidence was admitted.*

ROAD TRAFFIC

Driving licence—epileptic fits—control of disease by drugs—"suffering" from disease

Re Leddington's Application

Bromsgrove Magistrates' Court: June 3, 1958.[8]

L. was appealing against a decision of the Worcestershire County Council to refuse him permission to hold a driving licence. In 1955 L. had suffered an attack of idiopathic epilepsy and, having collapsed at work, was treated by a neuro-specialist who prescribed phenobarbitone and epanutin to be taken twice daily. In 1957 L., on his doctor's advice, ceased to take the tablets and, after three weeks, suffered a second attack. Since then he had taken the tablets regularly and no further fits had occurred. His previous licence had been revoked following a motoring accident, although, it was contended on L.'s behalf, this accident had no connection with his epilepsy.

In March of this year L. applied for a new driving licence and, in answer to the question "Do you suffer from epilepsy, etc.?" replied "No: I have suffered from epilepsy and received treatment to prevent repetition." The County Council refused the application, claiming that the applicant suffered from epilepsy within the meaning of section 5 of the Road Traffic Act, 1930.

On appeal to the Bromsgrove Magistrates' Court, the argument turned on whether or not L. still "suffered" from epilepsy. For L. it was argued that, although he was still taking the drugs referred to above, it was not definite proof that he was still suffering from the disease. In any case, L. had had two or three minutes' warning of both attacks, and if there were to be a recurrence while he was driving he would have sufficient time to stop the car before becoming unconscious.

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* The commentary to this case was written by the reporter, Mr. Charles Fay.

[8] For the applicant: Mr. J. M. C. Pugh, Solicitor (J. Y. Holt & Sellars); for the Worcestershire County Council: Mr. E. J. M. Barker, County Licensing Officer.

The magistrates allowed the appeal. [J. M. C. PUGH, *Solicitor*.]

Commentary. Under section 5 of the Road Traffic Act, 1930, where an applicant is suffering from a prescribed disease or physical disability the licensing authority is required to refuse the licence. Diseases and disabilities are prescribed by S.I. 1950, No. 333, Reg. 5 and include epilepsy. If it is admitted that the applicant is suffering from the prescribed disease or disability the authority has no option but to refuse the licence and no appeal will lie: *R.* v. *Cumberland Justices, ex p. Hepworth* (1931) 146 L.T. 5. Presumably, therefore, the magistrates decided that L. was not suffering from epilepsy.

TRIAL

Summing-up—further direction—jury's question revealing that they were proceeding on a wrong premise

R. v. Adair

Court of Criminal Appeal: Lord Goddard C.J., Barry and Ashworth JJ.: *The Times*, June 24.[9]

A. was convicted at quarter sessions, *inter alia*, of breaking and entering a public-house and stealing therein cigarettes, whisky and brandy. The jury were discharged from giving a verdict upon an alternative count of receiving a quantity of cigarettes knowing them to have been stolen. At the trial the case for the prosecution was presented upon the basis that A., together with another, had broken and entered the public-house, and there was no suggestion that A., whilst organising or assisting in the crime, had not taken part in the actual burglary. The jury, after considering their verdict for two hours, returned and asked whether A. could be found guilty of breaking and entering if he had remained at his own flat but had "organised the breaking in . . . , put pressure on someone to carry out the breaking and supplied a key or other equipment." The Deputy Chairman replied: "The answer is, he is an accessory before the fact and the short answer is: Yes." On appeal to the Court of Criminal Appeal, A. contended that the further direction to the jury was inadequate.

Held, that it was not in every case in which the form of the jury's question indicated a different approach to that put forward by the prosecution that it was necessary to review the evidence on the material points, but where the form of the question showed that the jury were assuming facts or drawing inferences for which there was no supporting evidence, a further direction was called for. In such a case the jury should be reminded how far the relevant evidence went. In the present case there was no evidence that A. put pressure on anyone to carry out the breaking and a fuller direction was, therefore, called for. On that ground the conviction could not be upheld. But on the facts of the present case the jury must have been satisfied of facts which proved A. guilty of the alternative count of receiving and, accordingly, a verdict of guilty of receiving would be substituted in accordance with the provisions of section 5 (2) of the Criminal Appeal Act, 1907. [H. P.]

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[9] For the appellant: *F. H. Lawton, Q.C., C. G. L. Du Cann* (instructed by Sampson & Co.). For the Crown: *H. F. Cassel* (instructed by the Solicitor, Metropolitan Police).

Commentary. This case is a good illustration of the dangers of what Dr. Glanville Williams calls "The inscrutability of the verdict" (*The Proof of Guilt*, 2nd ed., 272)—*i.e.*, "No reasons need or can be stated." If the jury had simply returned a verdict of guilty without asking any questions, that verdict would have been unimpeachable—yet it would have been based on quite inadmissible grounds.

At the first trial of Alger Hiss the jury (who disagreed) attempted to decide the case, not on the ground that certain documents had been typed on the same machine (as to which evidence had been offered) but on the ground that they had been typed by the same person (as to which there was no evidence). Alistair Cooke writes: "Thus the jury accepted as the crux of the case an experiment that had not been hinted at in evidence or charged by the judge. It was very enterprising of them but suggests that juries do not, in matters that absorb them, bother very much about their "solemn obligation to decide the issues solely upon the evidence"; or mark the reverential distinction that judges and lawyers make between law and fact, which for better or worse is the best defense of the jury system." (*A Generation on Trial*, 276.)

It is impossible to know how often verdicts (whether of conviction or acquittal) are given upon grounds which are wrong in law, and it is this lack of knowledge which, as Dr. Williams concludes, is the true cause for disquiet.

The substitution of a verdict of guilty of receiving is, perhaps, a little surprising, at first sight, in view of *R.* v. *Loughlin* [1951] W.N. 325; *R.* v. *Christ* [1951] W.N. 337 and *R.* v. *Melvin* [1953] 2 W.L.R. 274. The two latter cases seem to decide that, where the accused is charged in two counts with (1) housebreaking (or larceny) and (2) receiving, and all the evidence points to his being the actual thief, a conviction for receiving cannot stand with an acquittal on the first count and will be quashed as perverse.

While it is true that the actual thief can be held guilty of receiving as an accessory before the fact (*Carter Paterson & Pickfords, Ltd.* v. *Wessel* [1947] K.B. 849) it was not open to the court in the present case to treat A as the actual thief since he was acquitted on the housebreaking charge. Although "there was no suggestion that A . . . had not taken part in the actual burglary," the evidence was not inconsistent with his being *merely* a receiver. In *Christ* and *Melvin*, on the other hand, if the prosecution's evidence was believed, the accused was the thief; if not, he was not involved at all.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by Henry Palmer, *Barrister-at-Law*

Imprisonment

In R. *v.* Evans, the court (Lord Goddard C.J., Barry and Ashworth JJ.: June 9, 1958) upheld a sentence of seven years' imprisonment. E. had pleaded guilty at a Crown Court to forging bank notes and had asked for eighty-two other offences to be taken into consideration. E., who was a man of forty-five years of age, had no previous convictions for offences of dishonesty. The present offences took place over a period of one year from December, 1956, to December, 1957. The court stated that they were quite unable to say that for so serious an offence seven years' imprisonment was too heavy a sentence.

In R. *v.* Hartridge, the court (Lord Goddard C.J., Barry and Ashworth JJ.: June 16, 1958) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. H. had pleaded guilty at quarter sessions to shopbreaking, garagebreaking and workshopbreaking; and five other offences were taken into consideration (two cases of storebreaking, two of simple larceny and one of larceny as a servant). H., who was a man of thirty-eight years of age, had four previous convictions as follows:—four months' imprisonment in 1939 for stealing a motor-car and driving whilst uninsured; a bind over in 1940 for garagebreaking and larceny; three months' imprisonment in the same year for larceny from a shop; and finally six months' imprisonment in 1945 for stealing a motor-car and driving whilst uninsured. The court stated that, taking into consideration that H. had not been before a court for thirteen years and that his previous convictions were for offences of quite different character, they would treat H. almost as if he were before the court for the first time. In the circumstances, eighteen months' imprisonment, with an order under section 22, was the appropriate sentence.

In R. *v.* Gunner, the court (Donovan, Havers and Diplock JJ.: June 23, 1958) reduced a sentence of twelve months' imprisonment to one of three months' imprisonment. G. had pleaded guilty at quarter sessions to three offences of gross indecency with a boy of fourteen years of age; G. gave the boy money on at least two occasions, but the boy seemed to have gone willingly with G. both on the occasions in question and on other occasions when nothing improper took place. G., who was a man of twenty-four years of age, was previously of good character apart from one offence of stealing a bicycle when he was twelve years old. G. served in the army from 1951 to 1956 and re-enlisted in 1958. An army officer gave evidence of G.'s character and said that he was an extremely good soldier and above average as a corporal. The court stated that, having regard to G.'s previous good character and, in particular, to the very high testimonial given him by the army officer, the appropriate sentence was one of three months' imprisonment.

In R. *v.* McNeeny, the court (Lord Goddard C.J., Slade and Devlin JJ.: June 23, 1958) increased a sentence of three years' imprisonment to one of five years' imprisonment. M. had been convicted of receiving, larceny, false pretences and obtaining £10 on a forged Post Office order; and twenty-one other cases were taken into consideration. M., who was a man of thirty-five years of age, had eleven previous convictions, mostly for larceny, beginning in 1940. The court stated that this was about as serious a case as one could imagine. M. had been found guilty, first, of stealing the contents of a letter-box from a dwelling-house; second, of receiving two cheque-books, a typewriter, two rubber stamps, a driving licence, a Post Office Savings Bank book and keys, knowing them to have been stolen; third, of attempting to obtain a vacuum cleaner with a cheque from one of the stolen cheque-books; and, finally, of withdrawing £10 from the Post Office on a forged order, using the stolen Bank book. The sentence would be increased to one of five years' imprisonment.

Imprisonment—breach of probation

In R. *v.* Fazloodin, the court (Lord Goddard C.J., Barry and Ashworth JJ.: June 16, 1958) reduced a sentence of twenty-one months' imprisonment to one which would permit immediate discharge. F. had been placed on probation by quarter sessions for larceny and, during the currency of the probation order, had committed a further offence of making a false representation to obtain 10s. 6d. unemployment benefit. On being brought up before the quarter sessions for breach of probation the present sentence was imposed. F., who was a man of twenty-five years of age, had eight previous convictions and findings of guilt. The court stated that the offence committed whilst on probation was of a comparatively trivial nature. F. had failed to disclose that he had had a very short period of employment. The Ministry had written to F. to say that they were prepared to overlook the matter on repayment of the sum of 10s. 6d., but F. had not received the letter until it was too late. Accordingly, the sentence would be reduced so as to permit F.'s immediate release, but the probation order previously made would remain effective.

Preventive detention

In R. *v.* GRIBBEN, the court (Lord Goddard C.J., Barry and Ashworth JJ.: June 9, 1958) reduced a sentence of ten years' preventive detention to four years' imprisonment. G. had pleaded guilty at quarter sessions to housebreaking and larceny. G., who was a man of thirty-six years of age, had twelve previous convictions or findings of guilt. He had been to an approved school in 1936; in 1945 and 1946 he had committed a number of offences of larceny for which he had been given sentences of imprisonment varying from two to six months; and finally in 1951 he had been sentenced to seven years' preventive detention, from which sentence he had been released in May, 1956. After the present conviction, the welfare officer of the After-care Council and a probation officer wrote to the court stating that G. had made efforts to mend his ways and had obtained honest employment since his last release from prison. The court stated that the letters from the after-care authorities put G.'s conduct after his release in a somewhat more favourable light than was apparent at the quarter sessions. Having regard to this further information the court found it possible to avoid this further sentence of preventive detention and, accordingly, a sentence of four years' imprisonment, with an order under section 22, would be substituted.

Preventive detention—breach of probation

In R. *v.* HOCKEY, the court (Lord Goddard C.J., Barry and Ashworth JJ.: June 16, 1958) varied a sentence of eight years' preventive detention to a bind over for two years. H., who was a man of forty-one years of age, had a bad criminal record including a term at a Reformatory in 1932, two different terms of Borstal detention, imprisonment, more than one term of penal servitude and, finally, in October, 1949, a sentence of five years' preventive detention. H. was released from preventive detention in December, 1953, and was next before a court in January, 1956, when he was convicted at quarter sessions of housebreaking and stealing; and he was then placed on probation for three years. During his period of probation he committed the following offences:—(1)

wilful damage in January, 1957, for which he was sentenced to fourteen days' imprisonment; (2) larceny in a dwelling-house in February, 1957, for which he was conditionally discharged; and (3) loitering with intent in December, 1957, for which he was sentenced to three months' imprisonment. After his release from the last sentence of imprisonment H. obtained work with a builder, but in April, 1958, he was brought back to the quarter sessions for breach of probation and sentenced to eight years' preventive detention. He appealed against that sentence. The court stated that this was an exceptional case and the court was taking an exceptional course. The offences committed whilst on probation were not very serious and another sentence of preventive detention would mean that H. would be a criminal for the rest of his life. The builder for whom H. had been working had given him as good a testimonial as he could possibly get and was willing to have him back. In the circumstances H. would be bound over for two years.

Borstal training

In R. *v.* FLAHERTY, the court (Lord Goddard C.J., Slade and Devlin JJ.: June 23, 1958) substituted a bind over (with a special condition to return to Eire) for a sentence of Borstal training. F., who was a youth of nineteen years of age, had been convicted of loitering with intent to commit a felony and sentenced to Borstal training by quarter sessions. F. had come to this country from Galway in 1956 and had some petty convictions here. The court stated that there was really no reason why British taxpayers should have to pay the very considerable sum of money it would cost to keep him in Borstal training. Accordingly, F. would be bound over in his own recognisance in the sum of £10 to go back to Eire and not to return to this country for at least three years.

See R. *v.* NOSEDA AND OTHERS, reported at p. 541, *ante*.

Detention—breach of probation

In R. *v.* BRIDLE, the court (Lord Goddard C.J., Slade and Devlin JJ.: June 23, 1958) set aside a sentence of Borstal training and substituted a term of six months at a detention centre. B., who was a youth of seventeen years of age, had been put on probation by quarter sessions for a total of seventeen shopbreakings. During the currency of the probation order B. committed sixteen offences of shoplifting for which he was sentenced to three months at a detention centre. On being brought back to the quarter sessions for breach of probation, he was sentenced to Borstal training. B. appealed against the last sentence. Apart from the above, B. had no other convictions. The court stated that the appropriate sentence in this case was one of six months' detention in a detention centre to date from the beginning of the original sentence of detention.

[NOTE: As to the desirability of passing a sentence of Borstal training on a person who is serving, or has just been serving, a sentence at a detention centre, see *R.* v. *Gooding,* 39 Cr.App.R. 187, and *R.* v. *Smith* [1957] Crim.L.R. 457.]

Acts and Orders*

Food and Drugs

The Eggs Order, 1957 (S.I. No. 109) is revoked without prejudice to any proceedings in contravention thereof; but it is necessary to retain records of any transactions which were required to be kept by that Order for a period of one year, *i.e.*, until July 1, 1959. Operative July 1, 1958. EGGS (REVOCATION) ORDER, 1958 (S.I. No. 959).

London Traffic

The following Order has been made detailing prescribed routes: S.I. No. 928 (West Ham).

The following Order has been made revoking previous regulations made in respect of prescribed routes: S.I. No. 927 (Stepney), revoking S.I. No. 1268 of 1953.

The following Order has been made prohibiting waiting: S.I. No. 1017 (Romford).

The following Order has been made regulating the maximum weight of vehicles which are permitted to use certain routes: S.I. No. 929 (Surrey, relating to parts of the Abinger–Effingham Road (Route CX.43) situated in the Rural Districts of Dorking and Horley and Guildford).

Pests

The period during which potatoes may be imported from (1) Belgium, France and the Netherlands, and (2) Germany, is extended from May 31 to June 15, 1958. The earlier Orders (S.I. 1957, No. 2209 and S.I. 1958, No. 704) are amended accordingly. Both Orders operative May 31, 1958. IMPORTATION OF POTATOES and Importation of Potatoes from Germany (Amendment) Orders, 1958 (S.I. Nos. 896 and 897).

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Poisons

Various amendments are made to the Poisons Rules, 1952 (S.I. No. 2086) as subsequently amended. The principal changes are (1) Under the Pharmacy and Poisons Act, 1933 and the Poison Rules, 1952, as amended, the container in which a poison is sold is required to be labelled with the name of the poison, and for this purpose names given in the British Pharmacopoeia, the British Pharmaceutical Codex or the National Formulary are permissible. Paragraph 1 of the Schedule to these Rules places the British Veterinary Codex in the same position in this respect as these other works, and recognises the change of name of the National Formulary to the British National Formulary. (2) Paragraph 3 of the Schedule places restrictions upon the sale of monofluoroacetic acid and its salts similar to the restrictions already placed upon the sale of strychnine by Rule 16 of the 1952 Rules, as amended, and makes provision for its sale to certain persons for use as a rodenticide on production of a prescribed certificate. (3) The remaining paragraphs of the Schedule impose restrictions and requirements regarding certain substances now added to the Poisons List by the Poisons List Order, 1958 (see below), and make amendments consequent on the changes of nomenclature in the case of certain poisons recognised by that Order. Operative July 1, 1958. Poisons Rules, 1958 (S.I. No. 1016).

For penalties for contraventions see section 24 of the Pharmacy and Poisons Act, 1933.

Certain substances are added to the Poisons List, and a Schedule to the Order sets out the complete list as it now is. The names given to certain of the phosphorus compounds already in the list have been revised to accord with current usage. The Poisons List Order, 1953 (S.I. 1953, No. 1300), as amended, is further amended accordingly. Operative July 1, 1958. Poisons List Order, 1958 (S.I. No. 1015).

Police

The police areas consisting of the county of Carmarthenshire and the county of Cardiganshire have been amalgamated into one police area called the Carmarthenshire and Cardiganshire police area. The area has a combined constabulary and has one chief constable, and is administered by a single combined police authority. Operative July 1, 1958. Carmarthenshire and Cardiganshire Police (Amalgamation) Order, 1958 (S.I. No. 1074).

Public Health

These Regulations specify the emission of smoke from the chimney of a vessel which is permitted without constituting an offence against section 1 of the Clean Air Act, 1956, as applied by section 20 of that Act. Operative June 1, 1958. DARK SMOKE (PERMITTED PERIODS) (VESSELS) REGULATIONS, 1958 (S.I. No. 878).

Public Service Vehicles

The earlier Regulations of 1951 as amended are consolidated with certain further amendments, the principal of which are (1) the requirements as to certain matters have been varied, *viz.*, maintenance of steering arms (Reg. 10), carriage of inflammable or dangerous substances (Reg. 13), fire extinguishing apparatus (Reg. 15), and first aid equipment (Reg. 16). (2) Provision is no longer made as to having and maintaining speedometers, the maintenance of exhaust pipes, or the drawing of trailers (which matters are now covered by the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955, No. 482; [1955] Crim.L.R. 393). (3) Provision is no longer made regulating seating capacity and the number of passengers to be carried (which matters are now covered by the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954 (S.I. 1954, No. 1612) as amended in 1958 (S.I. No. 472; [1958] Crim.L.R. 339). Operative July 1, 1958. PUBLIC SERVICE VEHICLES (EQUIPMENT AND USE) REGULATIONS, 1958 (S.I. No. 926).

For penalties for contravention see Regulation 5 of these Regulations.

Rivers

Certain provisions of the River Boards Act, 1948 (11 & 12 Geo. 6, c. 32) are applied in respect of the Kent County Council. These provisions give the county council wide powers to prevent pollution of rivers in their area, including powers of entry and inspection and powers to make by-laws. It is unlawful for any person to obstruct the county council in the exercise of these powers and penalties for such obstruction are prescribed in section 17 of the 1948 Act. Operative June 16, 1958. COUNTY OF KENT (PREVENTION OF POLLUTION) ORDER, 1958 (S.I. No. 937).

Road Traffic

There is a printing error in the text of the official publication by the Stationery Office of the Road Transport Lighting Act, 1957

(5 & 6 Eliz. 2, c. 51). The last three lines of section 5 (3) should read:—

> "to separate lamps shall not include the requirements of any regulations as to the position of a separate lamp carried for the purposes of the said paragraph (a) or (b)."

Transport

Previous regulations are amended so that it is now permissible to use metal vessels of a capacity up to 90 gallons to convey by road, in vehicles other than tank wagons or tank trailers, petroleum mixtures which contain not more than 75 per cent. of petroleum. Under the former regulations the maximum permissible capacity of such vessels was 50 gallons. The 1957 Regulations (S.I. 1957, No. 191) are amended accordingly. Operative July 1, 1958. PETROLEUM-SPIRIT (CONVEYANCE BY ROAD) REGULATIONS, 1958 (S.I. No. 962).

For penalties for contraventions see section 6 of the Petroleum (Consolidation) Act, 1928.

Weights and Measures

The principal Regulations (S.R. & O., 1929, No. 183) are amended. An inspector who has withdrawn liquid fuel or lubricating oil from a tank or container for testing a measuring instrument is no longer required to return it into that tank or container if he thinks it impracticable or undesirable to do so, or if the trader or person in charge of the instrument does not wish him to do so. Instead he may place the fuel or oil in another receptacle provided by the trader or person in charge of the instrument. Operative June 9, 1958. MEASURING INSTRUMENTS (LIQUID FUEL AND LUBRICATING OIL) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 894).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

47. *Withdrawing a case from the jury*

I have been reading *Trial by Jury* by Sir Patrick Devlin. At page 78 His Lordship says, "The other great difference is that the verdict of a criminal trial can *never* be dispensed with. If the prosecution does not in the opinion of the judge offer some evidence which would justify a conviction, he does not, as in a civil case, withdraw it from the jury; he directs the jury as a matter of law to find a verdict of Not Guilty. . . . A trial once begun must end in a verdict unless the case falls within one of the recognised categories which justify the discharge of the jury without giving a verdict, such as a disagreement, illness, interference with the jury or the misconduct of one of them, or the utterance of inadmissible and prejudicial evidence. Without a verdict there cannot be a judgment." His Lordship refers only to the case of *R.* v. *Heyes* (1950) 34 Cr.App.R. 161.

Does this state the law without exception?

I note in an earlier case the court said " in our opinion once the Deputy-Chairman had reached the conclusion that there was no *real evidence* upon which the appellant could be convicted, the proper course for him was not to leave the case in the jury's hands, but to withdraw it from them." *George Johnson* (1928) 21 Cr.App.R. 66.

There is also the more recent case of *Charles Clement Abbott* (1955) 39 Cr.App.R. 141. The court held in this case *per* the Chief Justice at page 151 " it cannot be right for a judge to leave a case to the jury where the whole structure upon which the prosecution has been built up to that moment collapses and falls." Devlin J. was a member of this court and says at page 141, " there was, therefore, no evidence against the appellant fit to be left to the jury, and the judge should have withdrawn the case from them." His Lordship makes no reference to this case in *Trial by Jury*. [C. G. S.]

ANSWER

From the reports of *Heyes*, *Johnson* and *Abbott*, it is clear that the court was not using the expression " withdraw the case from the jury " in the sense in which Sir Patrick Devlin was using it in his lecture, but as equivalent to his " direct the jury as a matter of law to find a verdict of Not Guilty." Thus regarded, the dicta in these three cases are not at variance with Devlin J.'s views. [D. W. E.]

Letter to the Editor

No Case to Answer in the Court of Criminal Appeal

Dear Sir,

In Mr. Calvert's article in your April number, " No Case to Answer " in the Court of Criminal Appeal, he refers in his third paragraph to the possibility of an accused person under cross-examination giving evidence leading to his own conviction after a valid but unsuccessful submission of " no case." The legal effect of such an occurrence is not specifically dealt with in the article. On the basis of Channell J.'s explanation in *R.* v. *Cohen and Bateman* ((1909) 2 Cr.App.R. 197, 207) of the effect of section 4 (1) of the Criminal Appeal Act, 1907, it would appear that the accused would be entitled in such circumstances to have the conviction set aside, since the trial judge would have made a " wrong decision of " a " question of law."

There does, however, seem to be a marked distinction between evidence prejudicial to the accused given by a co-accused person or by the witnesses of that person, evidence which the accused cannot prevent being given, and evidence prejudicial to himself given by himself or by his witnesses after he has voluntarily elected to adduce evidence.

It is submitted that it is a somewhat startling proposition that an accused person who has, even after a valid but unsuccessful submission of " no case," himself given evidence, or against whom his own witnesses have given evidence, leading to his conviction, can maintain on appeal that that evidence must be ignored. But such would appear to be the legal position.

Yours faithfully,
P. C. HUBBARD.

London, W.14.

[*Mr. Calvert writes*: " The effect of the dictum of Channell J. in *R.* v. *Cohen and Bateman* is dealt with in my article at p. 234. Its application to the situation where an accused person under cross-examination gives evidence leading to his own conviction after a valid but unsuccessful submission of ' no case ' is considered at pp. 240 and 241, where I reach the same conclusion as your correspondent.

" I would agree that in principle there would seem to be a distinction between voluntary self-incrimination and incrimination by the evidence of a co-accused. This distinction, however, does not seem to have been drawn in the cases, where both are treated equally.

" The proposition that an accused can maintain on appeal that evidence which he has voluntarily given should be ignored may, I think, fairly be described as ' startling.' I agree with your correspondent, however, that ' such would appear to be the legal position.' Whether the present legal position is a desirable one is not, of course, a question with which I concerned myself."]

Books and Periodicals

Reviews:

The Hamlyn Lectures: The Proof of Guilt. A Study of the English Criminal Trial. Second edition. By Glanville Williams, LL.D., F.B.A., Reader in English Law in the University of Cambridge. London: Stevens & Sons, Ltd. 1958. ix and 326 pp. (20s. net.)

Dr. Williams has revised and expanded his Hamlyn Lectures, which were first published in 1955. (Reviewed [1956] Crim.L.R. 362.) The principal changes are in the chapter on " Mistaken Evidence." There is a new paragraph on " Suggestion and Leading Questions," in which it is argued, largely on the results of investigation by Continental psychologists, that the pre-trial interviews of witnesses by the side calling them have a tendency to falsify—quite innocently—the evidence given at the trial. See *Kerr* v. *H.M. Advocate* [1958] Crim.L.R. 387. Proposals to reduce this danger are that statements should be recorded in question-and-answer instead of in narrative form, or preferably, that they should be tape-recorded; and that copies should be made available to the other side. Apart from the obvious practical difficulties, is it not likely that this proposal would have the tendency considerably to prolong the length of trials by the opportunities it would afford for cross-examination?

Following on from this is a new examination of the propriety of interviewing the other side's witnesses. Dr. Williams has also added a criticism of the absence of a right to compensation where a man has been wrongly convicted. A number of minor amendments are made. It is noted that prisoners *are* sometimes prosecuted for perjury committed when on their trial, but it is stated that this practice is contrary to the policy initiated by the judges after the Criminal Evidence Act, 1898. It is observed that it is now the practice of prosecuting counsel to put in evidence any conviction of the prosecution's witnesses, so mitigating, to some extent, the injustice of section 1 (*f*) (ii) of the 1898 Act; and there is a new argument for relaxing the rule excluding proof of convictions when the only issue is as to *mens rea.* There are many interesting new references to foreign, especially Danish and Swedish, law.

The author and publishers are to be congratulated on keeping this most valuable work available and up to date. This reviewer's gratitude would have been increased if an index had been supplied.

J. C. Smith.

The Thief Takers. By Patrick Pringle. London: Museum Press. 1958. 220 and (index) 4 pp. (21s. net.)

In his latest study of eighteenth and nineteenth century law enforcement, Mr. Pringle deals particularly with the " thief takers," the private detectives of their day. In a Britain which believed very definitely in the merits of private enterprise, law enforcement was no exception. As a result, the encouragement to the thief takers to gild the lily or frame the innocent in the interests of reward lead to some strange justice.

Mr. Pringle is naturally only concerned with this period of our history, but his remarks regarding the relationship between what a nation is prepared to spend on its police and the amount of crime it may expect are especially apt; particularly when related to the handling of police pay in the post-war era and the mounting increase in crime, culminating in the recent order of the Commissioner of Police of the Metropolis. There is a great deal of truth in the author's comments on the amazing number of guises under which an Englishman's passionate love of thrift (or parsimony) can appear and the excuses he can find for it from love of liberty to the importance of tradition.

It is an enthralling story that this book tells and it does so in a racy and interesting manner. Apart from the central characters, who are the principal thief takers of the day, we learn a great deal from the asides including such ill-assorted items as the origin of the Lord Chamberlain's interest in stage plays; the regular use of public houses as places of detention including the building of cells in them; the practice of suing solicitors by dissatisfied clients and finally, the number of High Constables, who were also coal merchants, and the reason for same.

All these are fascinating glimpses of the era before the birth of a professional police, although no one can really call the "thief takers" amateurs. Mr. Pringle's book is well worth reading and will make a lively companion for that odd hour of leisure.

HUGH DUDLEY.

Books Received :

Russell on Crime. Eleventh edition by J. W. Cecil Turner. London: Stevens & Sons. 1958. 2 vols. 1843 and (index) 56 pp. (£10 10s. net.)

Patterns in Criminal Homicide. By N. E. Wolfgang. Pennsylvania: University Press; London: Oxford University Press. 1958. 370 and (biblio. and index) 40 pp. (40s. net.)

The Reluctant Cop. By Gerard Fairlie. London: Hodder and Stoughton. 1958. 187 and (index) 3 pp. (15s. net.)

Great Detective Exploits. By Leonard Gribble. London: John Long. 1958. 223 pp. (16s. net.)

Foul Deeds Will Rise. By Richard Harrison. London: John Long. 1958. 172 and (index) 4 pp. (16s. net.)

Readers' Digest

Conspiracy: The Brighton Conspiracy: 225 *Law Times* 294.

Criminology: An Institute of Criminology: 122 *Justice of the Peace* 398.

Evidence: Hearsay evidence: 66 *Police Review* 392.

General: Crime in South Africa: 122 *Justice of the Peace* 413.

Magistrates' Courts: Election to be tried summarily: 225 *Law Times* 308.

Road traffic: Concessions to commercial travellers: 66 *Police Review* 410.

Scotland: The Summary Jurisdiction (Scotland) Act, 1954, s. 16 (*c*): 1958 *Scots Law Times* 123.

Warrants and summonses: Service in Scotland, N. Ireland, the Channel Islands and the Isle of Man: 66 *Police Review* 378.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the **EDITOR,** ***Criminal Law Review,*** **3 CHANCERY LANE, LONDON, W.C.2.** ***Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.***

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THE

CRIMINAL LAW

REVIEW

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Editorial

Malpractices by the police

Under the heading " Brainwashing in England? " the *Economist* of August 2 referred to accounts of two cases in which it was alleged that the police had obtained statements from prisoners by the use of bullying techniques.

The first of these cases was heard at Birmingham Assizes on July 22 by Streatfeild J.[1] A twenty-three year old woman who was charged with the murder of her three month old child was discharged after the jury had been directed to return a formal verdict of " not guilty." This followed the judge's acceptance of submissions by the defence that the evidence of a police-sergeant was inadmissible. Streatfeild J. said:

> " This case is not an easy one, and I confess some of the evidence to which I have listened has surprised me very much indeed.
>
> " It has to be judged against a background of what sort of woman she is, and it appears to be proved already in evidence that she is a woman of not the highest intelligence.
>
> " I cannot remember having heard evidence of the taking of an interview when more talking was done by the interviewing officer and less by the accused."

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[1] *Manchester Guardian*, July 23; *Birmingham Post*, July 23.

The judge went on to say that the police-sergeant's long statements to the woman, consisting of " a series of very direct, leading questions," made it clear to her that, far from putting her at her ease, he did not believe a word of her statement which she had made to another police officer, whose taking of the statement was " quite impeccable."

> " Finally, to a woman of this intelligence only three months after the birth of her child, he puts this very direct leading question, ' Did you deliberately kill the baby? '
>
> " The question I have to consider is whether the whole interview was such as to be calculated to reduce this woman to a state where she was willing to accede to any suggestion made to her.
>
> " I have no hesitation whatever in saying that the whole conduct of the interview was of that description.
>
> " After . . . what strikes me as being very close to the most bullying cross-examination of this woman, she was reduced to such a state that she acceded to suggestion after suggestion that was made to her."

The second case, which has not been so fully reported, concerned a young nurse who was convicted at Lancaster County Quarter Sessions of the theft of three rings from a patient. She was put on probation and ordered to make restitution. Subsequently, it was found that, in fact, no theft had ever been committed and she was granted the Queen's Pardon. At her trial it was alleged that she had confessed to the crime ; this confession, she said, was made after she had paid three visits to the police station where she was subjected to " hard questioning " ; she was told that the police had witnesses to prove that she was guilty and that it would be the worse for her if she did not confess. Finally, she said, she almost believed what they said and admitted that she had stolen the rings and thrown them into the river. She thought that the latter part of the statement would cause the police trouble.[2]

After referring to these two cases, the *Economist* goes on to say that these incidents are by no means isolated:

> " Time and again the methods of the police have come into prominence at criminal trials: long hours of questioning sometimes through the night, until mental resistance is lowered ; promises that the accused will get off more easily if he confesses ; threats of what will happen if he does not. . . . But

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[2] *Daily Mail*, July 28.

> when an accused is found guilty, any complaints made on his behalf against the police tend to be discredited. Now, however, the complaint comes from an undoubtedly innocent person, and this proved false confession must throw doubt on all confessions extracted by a similar process."

There then follows a demand for an inquiry into "police methods."

We cannot agree with these general accusations and with the suggestion that these are not isolated incidents. To do so would be to cast doubts on the integrity of every serving member of the police, and there are approximately 66,000 in the 126 police forces in England and Wales and another 7,700 in Scotland's 33 forces. To demand an inquiry into police methods on the grounds of apparent malpractices on the part of one police officer in the Bedfordshire County Constabulary (strength, 554 men) when the conduct of a brother officer was stated by the judge to be "quite impeccable," and of three officers of the Lancashire County Constabulary (strength, 3,169) is to put these offences, serious as they are, out of perspective.[3] Nor can anyone be blamed for discrediting the allegations by persons subsequently found guilty of the offences with which they are charged: only a very few visits to the criminal courts need be paid before it becomes obvious that it is a common defence technique to accuse the police of perjury and other malpractices, and that, in the majority of cases, such accusations are baseless and valueless.

Further, if we are to see these cases in their proper perspective, we must look at the safeguards against police malpractices of this kind. Besides the obvious prohibitions against the use of violence, threats and promises, the taking of statements by the police is regulated by the "Judges' rules." These rules do not have the force of law but were laid down in 1918 by the judges of the King's Bench Division for the guidance of the police to ensure that any statement tendered in evidence should be a purely voluntary one and therefore admissible in evidence. The rules have since been supplemented on various points by two Home Office Circulars approved by the Lord Chief Justice.[4] Briefly, the rules give guidance on the administering of cautions, the language in which statements should be noted (*i.e.*, verbatim, not "official") and suggest that notes should be taken of such things as the time when a statement was begun and ended and what intervals were taken and whether any refreshment was supplied.

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[3] Figures cited are those given by the Home Office or are taken from the *Police and Constabulary Almanac*, 1958.

[4] 238/1947, November 26, 1947 and 27/1948, February 3, 1948.

Although, in the courts, the only effect of the rules is to assist in determining what evidence is admissible, disregard of them will, besides discrediting a police witness in the courts, almost certainly involve him in disciplinary proceedings under the Police (Discipline) Regulations, 1952, which provide for the investigation and punishment of a number of offences set out in the First Schedule to the Regulations. Besides specified offences such as the unnecessary use of violence to prisoners or others it is an offence:

> "if a member of a police force acts in . . . any manner . . . reasonably likely to bring discredit on the reputation of the force or of the police service."

Punishments for breaches of discipline range from dismissal, through loss of rank and monetary penalties, to cautions. Investigations are carried out by senior police officers and the case is heard by the chief constable of the force concerned. Punishments are subject to confirmation by the watch committee concerned, to whom a right of appeal lies. The proceedings, being quasi-judicial, are subject to the scrutiny of the courts through the prerogative orders, *e.g.*, certiorari. The only possible criticism of these arrangements can be that the investigations are not conducted by an independent body; but, even without that additional safeguard the police know that it is in their own best interests that malpractices, if they exist, should be investigated and punished.

By all means let us have an inquiry into cases, such as the two on which the *Economist* based its demands for a general inquiry, where there is a prima facie case to investigate, but do not let us brand some 75,000 police officers and men with a reputation for using the techniques of a "police state," when all the evidence for so doing is based on a few isolated cases and all the rest is mud slung at the police by criminals who have nothing to lose and everything to gain if they can make some of it stick.

An institute of criminology

Persistent agitation and much hard work on the part of many individuals and societies interested in the problems of crime and punishment have been largely responsible for bringing about the establishment of an institute of criminology in this country.

On August 1 the Home Secretary, Mr. R. A. Butler, announced in a written answer that he had consulted the Vice-Chancellor of Cambridge University who had said that the university would be glad to consider setting up the institute of criminology provided that the necessary funds could be made available. On this question Mr. Butler is consulting the University Grants Committee.

Mr. Butler went on to say that the nucleus of the institute would be the present Department of Criminal Science, but that it was planned to develop it on a broader basis and to associate all interested faculties with its management. The establishment would cover both teaching and research and would provide, in addition, facilities for exchanging views and information among those practically concerned with administering the law.

The Home Secretary himself warmly welcomed the proposal, saying that he was confident that its fulfilment would make an indispensable contribution to the study of the problems of crime and the treatment of offenders.

We, too, welcome this project; not, however, without some reservations. The Department of Criminal Science at Cambridge has done, and is doing, much valuable research work in this field and it is to be hoped that, in broadening the basis of the work done at Cambridge, this contribution will not be forgotten nor its continuance neglected.

On the other hand, much of this work has been confined within the limited field of law and, except for some research work carried out at the request of the Home Office, has been of an academic rather than of a practical nature. The Department, being part of the university, is concerned with the teaching of undergraduates and with graduate research. Criminology is, however, primarily a social science and, if the institute is to be of any practical value, the confines of the university and, particularly, the close alliance with the law faculty, must, to some extent, be discarded.

The institute will train to postgraduate level those who will carry out research and teach others, and will provide teaching for magistrates, probation officers, members of the police force, and of the prison service. This will, it is hoped, lead to an exchange of information and ideas between these various bodies and, also, to greater co-operation between them.

Finally, it is to be hoped that the blessing of the Home Office will not hamper the independence of the institute.

Trial by newspaper

The publication of the Report of the Tucker Committee[5] has caused a great outcry among the "popular press" who have alleged that the proposals of the Committee, if accepted, will undermine the "freedom of the press."

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[5] Report of the Departmental Committee on Proceedings before Examining Justices, Cmnd. 479.

Before considering the validity of this allegation it is necessary to look at the background of the Committee and its recommendations.

The appointment of the Committee in June last year [6] followed closely upon the comments of Devlin J. in the case of *R.* v. *Adams* [7] that it would have been better if the preliminary proceedings had been held *in camera*, as, under section 4 (2) of the Magistrates' Courts Act, 1952, they may be held, because " when you have a case which arouses widespread public interest it is inevitable reports should appear in the Press. . . . They would be read by the public consequently and by members of the public who might be asked to serve on a jury." After some weeks of public controversy, Mr. Butler appointed the Committee with the following terms of reference:

" To consider whether proceedings before examining justices should continue to take place in open court and, if so, whether it is necessary or desirable that any restriction should be placed on the publication of reports of such proceedings: and to report."

The Committee took the evidence of some 120 witnesses, including all branches of the law from the Lord Chief Justice to the lay magistrates and representatives of the Press as well as a number of associations interested in public problems. After taking this evidence the Committee found that, rightly or wrongly, many people, including in some cases the accused persons themselves, believed that, under the present system, there was a danger of the trial being prejudiced by reports of proceedings in magistrates' courts on an application for bail; by reports of evidence given at committal proceedings which is not subsequently given or is excluded at the trial; by reports of prosecution opening speeches at committal proceedings which contain allegations not supported by evidence given either at committal proceedings or at the trial. In particular, the inevitably one-sided character of the evidence given at committal proceedings, which is aimed at establishing whether or not there is a prima facie case to go to the jury, tends to impair public confidence in the administration of justice.

In considering the possible solutions to the problem, the Committee rejected the suggestion that the power to hold preliminary proceedings *in camera* should be extended, and have, in fact, recommended that that power should be reduced. They also rejected, as being neither adequate nor practicable, any solution which involved giving examining justices a discretionary power to limit reporting.

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[6] See [1957] Crim.L.R. 277, 499.

[7] See [1957] Crim.L.R. 365.

What the Committee have recommended is that committal proceedings should normally take place in open court but that, unless the accused is discharged by the justices, any report of the proceedings should be restricted to the particulars of the accused's name, the charge brought, the decision of the court and the like, *until the trial at the higher court has ended.* Where the accused is discharged a full report may be published immediately.

There is no suggestion of an absolute prohibition on the reporting of committal proceedings, only of delaying such reports until they can do no damage to the accused's case, but so far as the popular press is concerned stale news is not news.

There is no question of suppressing proceedings at the trial: committal proceedings are not " trials " but inquiries into the necessity of holding trials in particular cases. The Press may regard itself as the guardian of freedom but the proposals of the Tucker Committee hold out no threats to freedom ; rather, in their suggestions as to further limiting the power to hold committal proceedings *in camera* do they defend it.

Finally, it must be remembered that, to a very large extent, the " popular press " have brought these suggested restrictions on themselves. The sensation-mongering, banner headlined reports of committal proceedings, with all the emphasis put on " human interest " and the subsequent accusations, not altogether unfounded, of " trial by newspaper " are the principal, if not the only, cause for the now widespread belief that reports of committal proceedings are prejudicial to the trial.

The appointment of chief constables

Following his statement to the Association of Chief Officers of Police[8] that the appointment of chief constables from within the force they were to command is undesirable, the Home Secretary has withheld his approval from one appointment and has deleted a name from the short list put forward by another Watch Committee.

The Gateshead Watch Committee, on July 25, appointed as chief constable Superintendent Lorimer, who had thirty-one years of service, all with the Gateshead force, the appointment to be taken up in October when the present chief constable retires. A statement by the chairman of the Watch Committee quoted a letter from the Home Office as saying that, in view of his recent statement to the police conference at Eastbourne and bearing in mind Superintendent Lorimer's comparatively short period of service as a senior officer (he was appointed Superintendent last November), the Home Secretary was not prepared to approve this appointment. No personal reflection on Superintendent Lorimer was intended, but the appointment of a chief constable from another force was desirable. The Gateshead Watch Committee reaffirmed their confidence in the Superintendent and their decision to appoint him chief constable.

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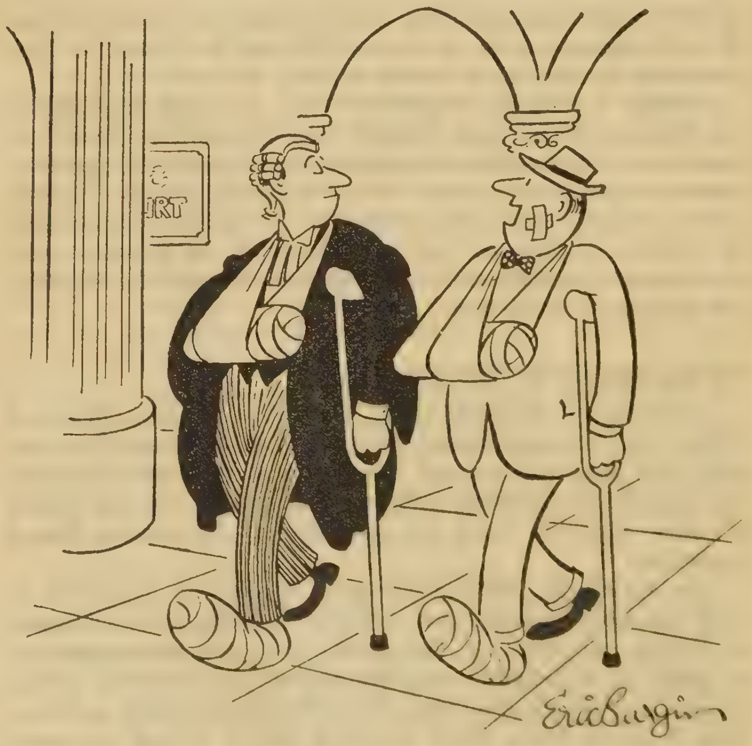
[8] [1958] Crim.L.R. 498.

The short list submitted to the Home Office by the Blackburn Watch Committee contained the name of the present deputy chief constable, who, during the illness of the late chief constable which lasted some years, has been carrying out the duties of chief constable. The name was deleted fom the list when it was returned to Blackburn. The Blackburn Watch Committee have asked the Home Office to reconsider the position.



"Five thousand damages for assault, and all due to that brilliant piece of reconstruction of yours."

Nolle Prosequi

> "Let a Nolle Prosequi be entered in my name in the case of the above-named, whose trial at —— on charges of —— now stands adjourned, in order to discharge all further proceedings therein *AND FOR SO DOING THIS SHALL BE YOUR WARRANT*." [1]

The suggestions made as a result of the failure of the jury to agree at the trial of William John Trew, the driver of the steam train involved in the Lewisham disaster, included a proposal by Mr. Marcus Lipton, M.P., that the Attorney-General should authorise the entry of a *nolle prosequi*.[2] It is to be assumed that the Attorney-General, who was of course consulted before the prosecution decided to offer no further evidence,[3] considered and rejected this proposal; his decision forms, therefore, a useful pretext for examining the history, law and practice relating to the exercise of this power to bring criminal proceedings to an end.

History of Nolle Prosequi

The law is now settled: the Attorney-General (and only the Attorney-General) can authorise the entry of a *nolle prosequi* in criminal proceedings pending in any court other than a court of summary jurisdiction [4]; his decision cannot be questioned in the courts [5]; and the entry operates only as a stay *sine die* of proceedings on the indictment, inquisition or information to which his fiat refers.[6] The Attorney-General's power is of great antiquity. In the case of *Goddard* v. *Smith* [7] in 1704 the Master of the Crown Office gave evidence that a *nolle prosequi* was entered on an indictment for the first time in the sixteenth year of the reign of King Charles II, but its use in proceedings on informations by the

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[1] Form of Attorney-General's fiat authorising the Clerk of Assize (or Clerk of the Peace or Clerk of the Central Criminal Court) to enter a *nolle prosequi*: Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed.), para. 199 (as substituted by 13th Cumulative Supplement).

[2] *The Times*, April 26, 1958.

[3] *The Times*, May 8, 1958.

[4] *R.* v. *Dunn* (1843) 1 C. & K. 730; *R.* v. *Allen* (1862) 1 B. & S. 850. For the circumstances in which the common law powers of the Attorney-General are exercisable by the Solicitor-General, see *R. v. Wilkes*, 4 Burr. 2527, at 2553–2555.

[5] *R.* v. *Comptroller-General of Patents* [1899] 1 Q.B. 909, at 914.

[6] *R.* v. *Ridpath* (1712) 10 Mod. 152.

[7] 6 Mod. 261; 11 Mod. 56.

Attorney-General was even then well established. Thus, in his Fourth Institute, which was published in 1644, Coke refers to an information preferred against thirty-nine Members of Parliament in 1555 and records the conclusion of the proceedings against two of the accused in the following terms:

> " Cess. process. per mandat attornat dominorum regis & reginae, quia ulterius prosequi non vult vers. ipsum Geo. Lye . . .
>
> " Ideo Edw. Griffyn ar. attornat. dominorum regis et reginae generalis qui pro ipsis rege et regina in hac parte sequitur, dicit quod ipse ulterius in hac parte vers. praefatum Joh. Harford prosequi non vult. Ideo cess. hic process. vers. eum omnino &c." [8]

It is not possible to do more than speculate about the origin of the procedure. An information was, however, in the nature of an action instituted by the sovereign acting through the Attorney-General [9] and the entry of a *nolle prosequi* operated in the same way as the discontinuance of a civil action.[10] Its extension to proceedings on indictment probably amounted to no more than the successful assertion by the Attorney-General of the sovereign's authority; but it has a logical basis of a kind, in that it is in principle reasonable that proceedings instituted in the name of the Crown should be subject to termination at the will of the Crown.

The subsequent development of the law is easy to follow. In the case of *Goddard* v. *Smith* already referred to it was held that the termination of proceedings by the entry of a *nolle prosequi* did not operate as an acquittal of the accused so as to found an action by him for malicious prosecution; and the necessary corollary of this conclusion appeared eight years later in the decision by the Court of King's Bench in *R.* v. *Ridpath* [11] that the prosecutor was not debarred by the entry of a *nolle prosequi* from preferring a fresh indictment charging the same offence. The reports suggest that there was for some time considerable doubt whether it could be entered on behalf of the Crown on the authority of prosecuting counsel,[12] but it was finally settled in *R.* v. *Dunn* [13] in 1843 that only the fiat of the Attorney-General would suffice. There are also a number of reported cases where, after the Attorney-General's fiat had been put in, the court heard argument on the question whether the proceedings ought to be terminated[14]; there is, however, no reported instance of a refusal to enter a *nolle prosequi* which had been authorised by the Attorney-General and it was finally decided in the case of *R.* v. *Allen*[15] in 1862 that his decision could not be called in question.

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[8] 4 Co.Inst. 20.

[9] Necessarily: *R.* v. *Austen* (1821) 9 Price 142n.

[10] *Cf. Stretton* v. *Taylor*, 1 Loo. 119, in which it was held that the entry of a *nolle prosequi* in an action for penalties under the Statute of Usury barred the Crown's right of action but not the informer's.

[11] 10 Mod. 152.

[12] *R.* v. *Rowlands* (1851) 17 Q.B. 671.

[13] 1 C. & K. 730.

For reasons which will appear later, that case is the last reported decision of any consequence about the law relating to the effect of a *nolle prosequi*; but before the practice governing its entry is considered reference should be made to the remarkable case of *R.* v. *Wylie, Howe and McGuire*,[16] in which Sir Gordon Hewart, the Attorney-General, sought to terminate proceedings which had been brought against three Australian soldiers whom it was desired (presumably for political reasons) to return untried to Australia. In the first instance he directed the entry of a *nolle prosequi* before the indictment had been found (with the result that the Home Office, misguidedly assuming that his fiat was effective in law, authorised the prison Governor to surrender the accused to the Australian authorities); the Clerk of Assize, however, pointed out that, until the indictment was found, there were no proceedings to be terminated, so that the fiat was in every sense a nullity; the Attorney-General accordingly signed a further fiat bearing the (subsequent) date on which the trial judge was expected to give leave for the indictment to be preferred. It is scarcely necessary to say that this device did not commend itself to the judge, who refused to allow a *nolle prosequi* to be entered on the record, but the case remains useful as an authority for the proposition that until the indictment has been found " neither the Attorney-General nor anybody else in this country could stay the proceedings."

A case of this kind would now be dealt with under the Visiting Forces Act, 1952, and the Orders in Council made under the Act, but it does not seem that, even before that Act came into force, the Attorney-General made a practice of resorting to devices of this nature. The former practice is not, however, easy to discover: Archbold, following Chitty's *Criminal Law*, the second edition of which was published in 1826, stated unequivocally that " the usual occasion of granting a *nolle prosequi* is either where in cases of misdemeanour a civil action is pending for the same cause; or where any improper and vexatious attempts are made to press the defendant, as by repeatedly preferring defective indictments for the same supposed offence; or if it be clear that an indictment be not sustainable against the defendant."[17] It would be strange if that passage were an accurate description of the practice: first, there appears to be no very good reason why the rule relating to the prosecution of a felon before he can be sued in tort should be applied, with or without adaptation, to the misdemeanant; second, since a *nolle prosequi* cannot be entered until the indictment has been found, its entry would not prevent the vexatious prosecutor from preferring a fresh indictment; and, finally, one would expect an unsustainable indictment to be quashed on a motion in that behalf by the accused. It is necessary, therefore, to examine the authorities cited in support of this statement of the old practice.

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[14] *e.g., R.* v. *Guerchy* (1765) 1 Bl.W. 545.

[15] 1 B. & S. 850.

[16] (1919) 83 J.P. 295.

Both Chitty and Archbold cite the cases of *R.* v. *Fielding*[18] and *Jones* v. *Clay*[19] in support of the proposition that it was the practice of the Attorney-General to enter a *nolle prosequi* on an indictment charging a misdemeanour if the prosecutor insisted on pursuing his concurrent civil remedy. There is a statement to that effect in the course of the argument in the case of *R.* v. *Fielding,* which was decided in 1759; but in *Jones* v. *Clay,* which was heard in 1798, counsel for the defendant, having been instructed to apply to the Attorney-General for his authority to enter a *nolle prosequi* in precisely these circumstances, reported back to the court "that the Attorney-General, having been applied to for the above purpose, had informed the defendant's agents that since he had been in office, it had been a rule with him never to grant a *nolle prosequi* in such cases." There is no record of a *nolle prosequi* having been entered in such circumstances since that date and the practice may be assumed to have died an early death.

R. v. *Guerchy*[20] is cited as the case where "improper and vexatious attempts are made to oppress the prisoner, as by repeatedly preferring defective indictments for the same supposed offence." Guerchy was the French Ambassador and would, therefore, have been able to plead diplomatic immunity to any charge, even if it had been rather better founded than the indictments which were preferred against him. On the other hand, it was plainly desirable for political reasons that he should not be required to plead to it and the report makes it perfectly clear that it was for this reason that the Attorney-General authorised, and the court assented to, the entry of a *nolle prosequi,* the repetition of the vexatious indictments being relevant only as evidence of the mala fides of the prosecutor.[21]

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[17] Archbold's *Criminal Pleading, Evidence and Practice* (23rd ed.), p. 111.

[18] 2 Burr. 719.

[19] 1 Bos. & Pul. 191.

[20] 1 Bl.W. 545.

[21] There was at this period no machinery enabling the Crown to take over proceedings instituted by a private prosecutor.

The indictment which was clearly not sustainable was preferred in the case of *R.* v. *Pond* [22] against a surgeon charged with failure to perform service as a constable, notwithstanding that he was by virtue of his profession statutorily exempt from such service. The case was decided as long ago as 1718 and the reports contain no other case of a similar nature; in these circumstances its authority may perhaps legitimately be regarded as slight.

The authorities quoted by the textbooks do not, therefore, bear out the propositions in whose support they were cited. Indeed, it seems on the face of it more likely that the Attorney-General's power was used for two quite different purposes: to dispose of technically imperfect proceedings instituted by the Crown; and to put a stop to oppressive, but technically impeccable, proceedings instituted by private prosecutors.

Crown proceedings

So far as proceedings by the Crown are concerned, it will be remembered that, before the enactment of the Indictments Act, 1915, the drafting of indictments was a highly technical affair, with the result that it was not infrequently necessary for the prosecutor himself to apply to the court to quash the indictment so that an amended form could be preferred against the accused. Since it was, however, open to the Attorney-General to stay proceedings on a defective indictment by authorising the entry of a *nolle prosequi*, the courts refused to accede to a motion of this kind made on behalf of the Crown.[23] The reports suggest that a *nolle prosequi* was entered in these circumstances in two kinds of case: first, where the Crown wished to withdraw a defective indictment in order to prefer an amended charge; second, where the proceedings against one of a number of persons jointly charged were terminated in order either to call him as a witness for the prosecution or (after verdict) to avoid the necessity of a retrial of the whole indictment.[24]

Private prosecutions

So far as proceedings by private prosecutors are concerned, it was not until the enactment of the Prosecution of Offences Act, 1879, which created the office of Director of Public Prosecutions, that it became possible for the Crown to take over criminal proceedings. The Crown's power to take over criminal proceedings now makes it unnecessary for the Attorney-General to exercise his power to authorise the entry of a *nolle prosequi* in cases, like that of Guerchy, where there are good political reasons for not proceeding. The combined effect of the Indictments Act, 1915, and the Prosecution of Offences Act, 1879, has, therefore, been to dispose altogether of the sort of case in which the Attorney-General's power was formerly exercisable and it is for this reason that it was said earlier in this article that no surprise need be caused by the scarcity of reported cases dealing with the law relating to the entry of a *nolle prosequi* after the case of *R.* v. *Allen* in 1862.

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[22] 1 Com. 312.

[23] *R.* v. *Stratton* (1779) 1 Doug. 239.

[24] For an example of the withdrawal of a defective indictment, see *R.* v. *Stratton*, 1 Doug. 239; of a case where one of the accused was called as a witness for the prosecution, *R.* v. *Teal* (1809) 11 East 307; of an entry after verdict, *R.* v. *Rowlands* (1851) 17 Q.B. 671.

Current Practice

There is only one reported decision which throws any light on the current practice: the case of *R.* v. *Beresford,* in which the accused, who had already been convicted of dangerous driving in respect of an incident which resulted in the death of a cyclist, was subsequently committed for trial on a coroner's inquisition charging him with manslaughter.[25] When he first appeared to answer the charge the prosecution sought to offer no evidence against him, but the judge refused to allow that course to be taken and adjourned the trial so that the Attorney-General could be consulted: and at the next assize a *nolle prosequi* was entered. It is understood that there have been other occasions where the Attorney-General has authorised the entry of a *nolle prosequi* in cases where exceptional circumstances have prevented the prosecution from adopting the course, which would otherwise have been followed, of seeking the leave of the court to offer no evidence. It appears, however, that the current practice is to confine the exercise of the power almost entirely to cases where, after the indictment has been signed, it is found that the accused is unlikely ever to be fit to stand his trial (so that it is not possible to place him in charge of the jury with the object of bringing the proceedings to an end with a formal verdict of not guilty).[26] In short, a power which was previously exercised largely (but not, of course, exclusively) in order to enable the Crown to present a fresh indictment is now exercised largely for the purpose of disposing of an indictment which would otherwise remain on the file. It is not, therefore, surprising that the Attorney-General came to the conclusion that it was not proper for him to direct the entry of a *nolle prosequi* in the case of Trew, since, as is now known, it was possible to dispose of the indictment against him by obtaining a verdict from a jury.

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[25] (1952) 36 Cr.App.R. 1. The accused pleaded guilty to a charge of dangerous driving which was preferred as a result of a collision between his car and a pedal cyclist on a cycle path. The cyclist died. The justices imposed a fine of £7 10s. and ordered the accused's licence to be endorsed.

[26] Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed.), para. 198 (as substituted by 13th Cumulative Supplement).

There have, however, been three recent cases where a *nolle prosequi* has been entered on an indictment which could in fact have been disposed of in the ordinary course. Although all of them achieved considerable publicity in the daily Press, none found its way into the Law Reports; nevertheless, the mere fact that each constituted a departure from the current practice justifies a careful scrutiny of the Attorney-General's decision.

The dock strike 1951

The first was the prosecution of the leaders of the unofficial dock strike in the spring of 1951. Seven men were charged on an indictment containing (so far as is relevant for the purposes of this article) two alternative counts: the first in effect charging them with conspiracy to incite others to strike in contemplation of furtherance of a trade dispute,[27] the second with conspiracy to incite others to strike otherwise than in contemplation or furtherance of such a dispute. It followed, of course, that, if the jury were satisfied that the accused had conspired, they were bound to convict them on one of those two counts and acquit them on the other. Unfortunately, they were directed to consider the counts, not merely separately, but wholly independently, with the perhaps not altogether surprising result that they returned irreconcilable verdicts, disagreeing on the first count and convicting on the second. They could have disagreed only about the question whether the accused conspired or about the question whether the dispute was, or was not, a trade dispute as defined for the purposes of the Conspiracy and Protection of Property Act, 1875[28]: in either event disagreement on the first count necessarily involved disagreement on the second. It appears from the newspaper reports that the defence moved to arrest judgment; it may be thought that the motion was bound to fail, since there was no defect on the record which would entitle it to succeed, but in the event no decision was reached, for the Attorney-General intervened before the submissions were completed in order to authorise the entry of a *nolle prosequi.*

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[27] Such a conspiracy is not now an offence: see s. 3 of the Conspiracy and Protection of Property Act, 1875, but at the material time the notorious Order 1305 (S.R. & O. 1940 No. 1305, Conditions of Employment and National Arbitration) was in force. The effect of that Order was, put very shortly, that it was an offence to call a strike in connection with a trade dispute before going to arbitration.

[28] *i.e.*, by s. 5 (3) of the Trade Disputes Act, 1906.

The prosecution of the strike leaders produced neither a conviction nor an acquittal; it did not even bring the strike to an end.

Merrifield Case, 1953

The case of *R.* v. *Merrifield* in 1953 also achieved an unsatisfactory result. It will be recalled that Merrifield and his wife were charged with murder. The jury convicted Mrs. Merrifield, but failed to agree on their verdict about the husband. It appears that the prosecution had come to the conclusion that, if the jury failed to agree in their verdict, no further proceedings would be taken, but by the time the jury had finished their deliberations the summer assize had ended and no other jury was available, and no other jury would for some time have been available, to dispose of the charges against him. It would not, it may be thought, have been very difficult to take steps to have Merrifield brought before the first available jury and acquitted, but the Attorney-General decided to dispose of the indictment by authorising the entry of a *nolle prosequi.*

Adams' Case, 1957

The third case is even more remarkable. Immediately after the jury had acquitted Dr. John Bodkin Adams on a charge of murder at the Central Criminal Court in April of last year it became known that after his committal another indictment charging him with murder had been preferred against him with the leave of a High Court judge under section 2 (2) (*b*) of the Administration of Justice (Miscellaneous Provisions) Act, 1933.[29] The Attorney-General, who had appeared for the prosecution at the trial of the first indictment, directed the entry of a *nolle prosequi* on this indictment before any further proceedings could be taken on it. It seems safe to say that this is the first occasion on which a *nolle prosequi* has been entered on an indictment preferred in these circumstances and, since it is scarcely conceivable that either the Attorney-General or any of his successors will seek to revive the charge contained in it, there appears to be no reason of any kind why Adams should not have been placed in charge of a jury and formally acquitted on the direction of the judge.

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[29] As the count in this indictment was founded on evidence called before the examining justices, it could have been included in the indictment containing the count on which he was committed for trial: see proviso (i) to s. 2 (2) (*b*), but it was the practice in cases of murder to prefer separate indictments: *R.* v. *Davis* (1937) 26 Cr.App.R. 95. That rule of practice has, it would seem, been indirectly abolished by s. 6 of the Homicide Act, 1957.

Summary proceedings

Two minor matters remain to be dealt with before it is possible to turn to the question whether the exercise of the Attorney-General's power is subject to any form of control. First, at the outset of this article it was pointed out that a *nolle prosequi* could be entered in criminal proceedings pending in any court other than a court of summary jurisdiction. In law the power is not exercisable in relation to proceedings in courts of summary jurisdiction because their procedure is governed by statute. In practice it was never required: in earlier days, because summary proceedings were neither instituted by the Crown nor based on formal pleadings; nowadays, because there is not the same obligation on the prosecutor to proceed within a limited time, the court being able to dispose of the proceedings in the absence of the accused.[30]

Practice

Second, the change in the practice governing the entry of a *nolle prosequi* has been accompanied by a substantial relaxation in the formality of the procedure for obtaining it. At any rate until some time in the nineteenth century it was the practice for the Attorney-General to hold a judicial hearing when an application was made to him, calling on the prosecutor, if the application were made by the defence, to show cause why he should not grant it[31]; his fiat was a long-winded document[32]; and the *nolle prosequi* was entered in formal language upon the record.[33] Today the application is made informally, as often as not (so it is understood) by the prosecution on the suggestion of a judge to whose notice the medical condition of the prisoner has been brought[34]; the Attorney-General's fiat takes the brief and lucid form set out at the head of this article; and there is no record on which the *nolle prosequi* can be entered.

Control of the Attorney-General's Power

"Another case in which the Attorney-General is pre-eminent," said Smith L.J. in *R.* v. *Comptroller-General of Patents*,[35] "is the power to enter a *nolle prosequi* in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a *nolle prosequi*, and that power is not subject to any control." This passage means, of course, that the Attorney-General is not subject to any control by the courts; he is, however, answerable to Parliament for his exercise of the power and, although in practice he would not be subject to any pressure to use it in a particular case, it seems reasonable to suppose that abuse of it would have serious political consequences, just as the belief that Sir Patrick Hastings had abused another judicial power of the office led to political, rather than legal, consequences.[36] The *Trew* case itself is a clear indication that the Attorney-General would not be subject to pressure in Parliament before the question of exercising the power in any individual case arose: Mr. Lipton's suggestion that he should authorise the entry of a *nolle prosequi* was contained in a Parliamentary Question, but that Question never appeared upon the Order Paper (and accordingly was neither put nor answered on the floor of the House), having been disallowed, it seems safe to assume, upon the grounds that it might tend to prejudice proceedings that were still pending.[37] In fact, the Attorney-General's exercise of the power to authorise the entry of a *nolle prosequi* has never been called in question in Parliament in modern times. It would be wrong to infer either that parliamentary control is ineffective or that his exercise of the power has been beyond criticism; but it would not, perhaps, be unfair to suppose that there has been no use of it amounting to such an interference with the due processes of law as to call for the intervention of Parliament.

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[30] Magistrates' Courts Act, 1952, ss. 15–17; and see the Prosecution of Offences Regulations, 1946 (S.R. & O. 1946 No. 1467/L17), Regulation 9 of which requires justices' clerks to report to the Director of Public Prosecutions any case in which the prosecution is not proceeded with within a reasonable time.

[31] Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed.), p. 111.

[32] *Ibid.*, p. 111.

[33] For the form of the entry, see Archbold's *Criminal Cases* (16th ed.), pp. 100–101.

[34] Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed.), para. 198 (as substituted by 13th Cumulative Supplement).

[35] [1899] 1 Q.B. 909, at 914.

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[36] See [1956] Crim.L.R. 725, particularly at 727–728.

[37] Erskine May's *Parliamentary Practice* (16th ed.), p. 359. Parl.Deb. (1907) 177, c. 1614.

Self-Defence in Homicide From Strict Liability to Complete Exculpation

By BERNARD BROWN, LL.B.

Pardonable and Justifiable Homicide

In an ungoverned society the savage law of the jungle prevails. The fundamental instinct of the creatures of such a society is one of self-preservation, which causes the wreaking of unregulated violence on one whose actions are felt to endanger the security of another. When government becomes invested in a single person or authority, rules are straightway laid down for the discipline of those governed. Obedience to those rules is a condition precedent to the very life of the ruling body.

The first business of a ruler is the elimination of all forms of self-help ; this is responsible for the strict liability of earliest law. As the power of the ruler becomes more firmly established the need for these strict rules diminishes, and in rare cases a man's efforts on his own behalf are regarded as being justified. Any such exceptions to the general principle that self-help is illegal are, however, severely restricted by the prerequisites of necessity and public policy. They emerge only as the products of a firmly entrenched system of law which has attained a high standard of efficiency and functional precision.

The history of the development of self-defence from a punishable to a legally justifiable act follows this pattern.

The early attitude of the courts to an act of self-defence is revealed in an action for battery in the King's Bench in 1312. It was found that the blow struck by the defendant was necessary for his protection and " that the action was brought out of malice. It was, nevertheless, adjudged that the plaintiff should recover his damages . . . and that the defendant should go to prison. The defendant had committed the act of battery: therefore he was to make reparation. He was not permitted to justify his act as done in protecting himself from the attack of the plaintiff. That attack rendered the plaintiff liable to a cross-action but did not take away his own action." [1]

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[1] Quoted by J. B. Ames at p. 97, " Law and Morals," in Harv.L.R. Vol. 22. It was not until 1400 that self-defence became a bar to an action for battery. See Y.B. 2 Hen. 4, 8 pl. 40 (1400).

Bracton's works supply ample evidence[2] to support the contention that in the thirteenth century, he who killed by misadventure or in self-defence, "deserved but needed a pardon." In a case of 1236 (mentioned in Bracton's *Note Book*) the jury found that a homicide had been committed in self-defence and concluded: "*dominus rex de gracia sua, non per judicium perdonavit ei mortem illam.*" That the pardon was not an act of justice but one of grace was apparent from even earlier cases. In 1203[3] Robert de Herthale who had killed in self-defence a madman already responsible for the deaths of five men in an outburst of frenzy, was "committed to the Sheriff that he may be in custody as before for the King must be consulted in this matter." Roger de Stainton, reported[4] a few years later to have slain a young girl by pure mischance, was not released until the King, "moved by pity," pardoned him his deed.

The frustration experienced by the court in such cases was summed up in an extract from a judgment which appeared in an old Precedent Book[5]: "We say that what you did was done in self-defence: but we cannot deliver you from your imprisonment without the special command of our lord the King."

So for the wholly blameless act of homicide in self-defence the slayer was subjected to imprisonment, often in the vilest conditions, and to all the uncertainty and delay of the operation of the royal prerogative.

Early justifiable homicide[6]

Acts which, at this time, were regarded as justifiable were rare and tended rather towards executions of justice than to cases of legitimate self-defence.

Justifiable homicides were confined to three cases. The first was the very obvious one where death resulted from the lawful sentence of a competent court. In the second case it was deemed justifiable, by a statute of 1293,[7] for foresters and parkers to kill trespassers on Royal (and other) preserves who resisted arrest.

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[2] See Br. "De Legibus," 1446. Pardon to man who defended himself against a burglar who had broken into his house. Also Br. *Note Book*. iii, 107, No. 1084 (1216). For further examples, see *Select Pleas of the Crown* (Selden Soc.), pl. 70, 114, 188. *Gloucestershire Pleas*, pl. 15, 53. (In Fitz. Ab Corone, pl. 354, the prisoner was not put in irons.) *Northumberland Assize Rolls*, pp. 85, 94, 111, 323, 343, 348.

[3] Seldon Soc., Pl.Cr., i, No. 70.

[4] Selden Soc., Pl.Cr., i, No. 114.

[5] 1 Selden Soc., 31.

[6] What the law requires it justifies. "Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud." 5 Co.Rep. 115b.

[7] 21 Edw. 1, st. 2. This was thought to have resulted from a controversy between the King and his magnates (c. 1239) which arose after the King pardoned a forester of Earl Ferrers who had slain a trespasser in self-defence.

Thirdly, an outlaw, a hand-having thief or other manifest villain who tried to resist arrest could be slain.[8] Much judicial conflict centred around this last category of justifiable homicide. In a case of 1221,[9] Howel the Markman, a notorious robber, and his associates, set upon a carter and attempted to rob him. The carter retaliated by killing Howel and made good his escape from the others. It was testified that Howel was a robber and the carter was allowed to go quit: " and note there is here no resort to the King's Pardon." (The carter, however, having little confidence in the machinery of justice, and some uncertainty as to the legality of his cause, had already fled to parts unknown.) This liberality was repeated in 1256,[10] when a servant was set free after killing a lunatic chaplain who had broken into his master's house by night. And a decision of 1273 [11] went even further. In that case a *flying* robber was summarily beheaded by an enraged householder who was forthwith acquitted and saved from the expense and inconvenience which recourse to the Crown's mercy would have incurred.

There was another side to the story, however. A and B, chasing a robber in the night, mistook each other for their quarry and, in the ensuing struggle A killed B in self-defence. A was left to languish in gaol until a pardon was granted.[12] A similar fate was that of a woman who had killed in resistance to rape. Yet in the same year there was recorded [13] an acquittal for a killing in identical circumstances. Again, in the same Year Book of Edward I [14] two verdicts in cases involving the slaying of wheat thieves stood in contradistinction.

By the middle of the fourteenth century, however, it was widely accepted that " when a man justifies the death of another as by warrant to arrest him, or that he comes to his house to commit burglary or the like, if the matter be found the justices let him go quit without the King's Pardon. . . ." [15] This was supported by a strong dictum of Thorpe C.J. in *Compton's* case.[16]

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[8] Br. f. 128b. By local custom of the wild Welsh Marches an outlaw found there could be slain even if he made no resistance. For cases in which felons were killed where arrest could be accomplished by no other means, see Y.B. 30–31 Edw. 1 (R.S.) 512; Fitz. Ab Corone, pl. 179, 192, 194, 261, 288.

[9] Quoted by Wigmore at p. 323, " Responsibility for Tortious Acts," in (1894) 7 Harv.L.R.

[10] *Northumberland Assize Rolls* (Surtees Soc.), 943.

[11] *Staffordshire Collection*, iv, p. 215.

[12] Quoted at p. 478, Vol. 2, Pollock and Maitland, *History of English Law*.

[13] Both quoted from Page, *Northumberland Assize Rolls*, 85 and 94.

[14] 1302 Y.B. 30–31 Edw. 1, 513 (Rolls Ed.). 1302 Y.B. 30–31 Edw. 1, 518 (Rolls Ed.). In the latter case the slayer killed the thief in defence of his brother's life.

[15] 1349 F.Corone 261 (22 Edw. 3).

[16] 22 Lib.Ass 97, pl. 55. " And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to

But aberrations continued, and it was not until 1532,[17] when a statute was passed for the express purpose of eliminating doubt as to the justifiable nature of such acts that all " question and ambiguity " disappeared.

Homicide Pardonable for Misadventure or Self-defence

To the statement " let him go quit without the King's Pardon " (quoted above [18]) which referred to cases of resistance to lawful arrest, burglary " or the like," was appended " it is otherwise where a man kills another by misfortune or in self-defence. . . ." Homicides committed in such circumstances were not justifiable but pardonable.

The form of pardon [19] where a killing had been in self-defence was as follows: " Whereas we have learned by an inquest taken by Henry de Frankham or whereas our justices in their eyre in S. have informed us after an inquest taken before them that Roger de Copford killed Simon de Stonham Parva in self-defence and not by felony or of malice aforethought. Now we have pardoned to him the suit which pertains to us for the said death and have granted him our firm peace, but so that he shall stand to right in our court if anyone (or if any of the kinsfolk of the slain) desire to complain against him."

Before the Statute of Gloucester in 1278, it had become customary for clerks in Chancery to issue a special writ authorising an inquest to determine whether the homicide had been committed " by misfortune, or in his own defence, or in any other manner without felony." This practice, which by-passed the process involving the royal pardon, was abrogated by the statute which purported to regularise procedure in all such cases. Clause 9 stated that no further writs for inquests were to be granted. Instead, the justices at gaol delivery were to require the jury to find the circumstances of the killing. If these amounted to accident or self-defence then " the justices shall inform the King, and the King shall give him (the accused) grace, if he pleases."

In the words of the statute, the accused thus " put himself upon the country for good or ill." This reliance did not make for wholly salutary results. Sir Edward Coke, however, saw in the Statute of Gloucester only a liberalising influence, but his view was of little

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commit burglary in his house, he may safely kill them if he cannot take them. . . ."

[17] 24 Hen. 8.

[18] See note 15, *supra*.

[19] Taken from the patent rolls of Henry 3. See Pollock and Maitland, *History of English Law*, Vol. 2, p. 480, for a similar form for homicide by misadventure.

value for his misconstruction of the terms of the Statute of Marlborough [20] had led him to the erroneous conclusion that before 1267 a slayer in self-defence or by accident was hanged. In actual fact, the statute accomplished little more than to restore the long delays and the accompanying discomforts in each case to the royal mercy.

By the end of the fourteenth century, pardons for misadventure or self-defence were becoming a mere formality, and the circumstances of their commission were recognised as providing grounds for the issue of a Pardon of Course.[21] The natural accompaniment of the Pardon of Course was the forfeiture of the felon's chattels to the Crown: an exactment which had originally been incurred only where the accused, after killing in defence of his life or by accident, had taken flight.[22] Another disadvantage of the formal conviction and pardon was the slayer's liability to prosecution at the suit of the slain man's kin. Advice to a recently pardoned killer who was appealed in this way was offered by Thurkelby, a justice of Henry III. "You had better go to battle; but directly a blow is given cry 'Craven' and produce your charter; you will not be punished for the King has given you your life and members." [23]

In time the appeal came to be largely displaced by indictment, and the Pardon of Course became still more a formality. The Charter of Pardon was issued and signed by the Chancellor in the King's name and in this way the influence of equity reasserted itself. The procedure in such cases can be seen from a report of 1329.[24] "Note that when a man is acquitted before the justices errant for the death of a man soy defendo, the process is such, that he shall have the writ of the Chief Justice, within which writ shall be contained the record of his acquittal to the Chancellor, who shall make him his writ of pardon without speaking to the King by course of law. Such a man is bailable after the acquittal . . ." and again in the same year,[25] "Scrope C.J. and Louther Justices, ordered the prisoner to remove the record into the Chancery; and the Chancellor made him a charter in such a case without speaking to the King."

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[20] See Coke, 2nd Inst., 148. Stat. Marlborough, 1267.

[21] See Plucknett, *Concise History of the Common Law*, p. 420.

[22] In the case of flight, see Foster, *Discourses of Homicide*, 272 Hale "2 P.C." 93. Foster, *Discourses of Homicide*, pp. 286, 287, doubted whether for homicide "*per infortunium* or *se defendo*" "a forfeiture of *the whole* was ever incurred." It was evident from 4 Hen. 7, 2 pl. 3, which is quoted there at length and from the preamble to Stat. 24 Hen. 8, that forfeiture was incurred in such cases.

[23] "La Corone pledee devant justice." Camb.Univ.Libr., Mm. 27, f. 124. In court the kin was invited to prosecute "at once or never."

[24] F.Corone 361 (3 Edw. 3).

[25] F.Corone 297 (3 Edw. 3).

During the fifteenth and early sixteenth centuries there can be little doubt that the practice of returning acquittals [26] in such cases was adopted by the court, but Sir Mathew Hale [27] reminded his readers that the "proper course" in these cases was for the jury to find the facts specially "et sic per infortunium vel se defendo . . . and the jury is only to find the fact and leave the judgment thereupon to the court." Throughout this period there ensued a long struggle between Bar and Bench. The former wasted no opportunity to point out the advantages of complete exculpation in cases where the law demanded a formal conviction.

The whole conflict was epitomised in a case of 1490 (quoted by Professor J. R. Beale in "Retreat from Murderous Assault" [28]). "In the chancery it was moved that one was indicted because he killed a man *seipsum defendo*. . . . And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form. *And it was suggested by the Serjeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him* . . . [29]; but if the indictment were for felony, and the party put himself upon the inquest for good or ill according to the Statute of Gloucester, c. 9, then if the inquest found that he did it *se defendendo* the judges would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

"Fairfax (Justice of the King's Bench), who was in the Chancery, went to his companions, and returned and said that their custom was to take inquest and inquire whether he did it se defendendo or not, and if so found he lost his goods . . . ; and so it seemed to the Chancellor that a charter [30] should be granted.

"Note the opinion of the Justices of the Bench against the Serjeants."

The weight of opinion at the Bar in favour of complete exculpation in cases of necessary self-defence ultimately brought about the transformation of the old equitable defence into a legal one. Two factors combined to effect this: the Statute 24 Hen. VIII and its generous interpretation by the common law judges of the sixteenth century.

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[26] See Ames, "Law and Morals" (1908–9) Harv.L.R. p. 97. Jury allowed to give verdict of not guilty. Of course where there was no guilt there was no forfeiture.

[27] Hale P.C. i. 471.

[28] (1902–3) Harv.L.R. 4 Hen. 7, 2 pl. 3.

[29] Author's italics.

[30] Char. t. de Pardone 65. "Home avera chartere de pardon de course hors del Chancerie pur mort de home se defendendo."

It is worth noting parts of the preamble to this statute. " Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any persons in or nigh any common highway . . . or in their mansions . . . should happen in his or their being in such their felonious intent to be slain by him or them whom the said evildoers should so attempt to rob or murder ; . . . the said person . . . should for the death of the said evil disposed person forfeit or lose his goods and chattels for the same, as any other person should do that by chance-medley should happen to kill or slay any other person in his or their defence . . . be it enacted . . . That if any person . . . be indicted of or for the death of any such evil disposed person . . . (he) shall not forfeit or lose any lands, tenements, goods or chattels . . . but shall be thereof and for the same fully acquitted and discharged in like manner as the same person or persons should be if he or they were lawfully acquitted of the death. . . ."

On a strict interpretation the scope of the statute was restricted to the abolition of forfeiture in cases where the accused had slain one who had tried " to rob or murder " him.

In the first place, however, it was generously construed to obviate the necessity for a pardon in such cases, and then further extended to make available these advantages (no forfeiture and no necessity for a pardon) to the case where " a person should happen to kill or slay any other person in his or their defence." This phrase had been mentioned in the preamble by way of *contrast* to the case where the accused had killed one who had attempted feloniously " to rob or murder " him.

Some common law judges made no secret of their aversion to the formal conviction. In a case of 1534 (two years after the statute) where death had resulted from the necessary exercise of self-defence, it was recorded that the accused " . . . should have his charter of pardon. And *Port J. adjudged that he should go adieu. Quod nota.*"[31]

The formal pardon in cases of necessary self-defence disappeared after the statute, and in all probability died a natural death at some time during the late sixteenth and early seventeenth centuries. Sir Edward Coke made no reference to it, and Sir Mathew Hale[32] alluded to it only in passing, for by his time it was recognised that the slayer in self-defence was guilty of no offence because the felony appearing on the indictment was disproved. Sir Michael

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[31] 26 Hen. 8, 5 pl. 21. (Author's italics.)

[32] 2 Hale P.C. 258.

Foster, writing in the eighteenth century, complained of the "writers on the Crown-Law, who, I think have not treated the subject of self-defence with due precision," but he recognised as a well-established form of justifiable homicide, a killing in necessary self-defence to which ". . . the party is entirely innocent, he hath gone no farther than nature leadeth, no farther than duty, founded on the great law of self-preservation, will carry the wisest and the best men." [33]

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[33] Foster, *Discourses of Homicide*, p. 289.

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The Detection of Fingerprints on Documents

By WILSON R. HARRISON, M.SC., PH.D.,
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The opinion seems to be widely held that a document, if handled with the ungloved fingers, will readily acquire fingerprints which may be rendered easily apparent by some simple and straightforward treatment, just as fingerprints are brought up on polished wood or metal surfaces. This is probably why, when documents such as anonymous letters are submitted for laboratory examination, the request is often made for them to be examined for the presence of fingerprints, whose discovery, it is hoped, will pave the way for the identification of the writer.

Whilst it cannot be denied that, on occasion, fingerprints may be discovered and even identified on a paper surface, it is possible for a document to be subjected to a considerable degree of handling without it being possible to discover any trace of a fingerprint. Indeed, in the course of the research into methods of detecting fingerprints on documents which has been carried on at the laboratory directed by the author, the work has been hindered by the fact that suitable "raw material" has been difficult to acquire. It has unfortunately proved to be the case that no matter how firmly a sheet of paper is held by the author, it is only on the rare occasion that even a fragmentary finger impression can subsequently be detected. This is not unique, for it has been shown to be the case with the majority of those with dry, clean skins.

This discovery is of some interest for it follows that, if a suspect document is treated and found to be devoid of fingerprints, it is no longer necessary to postulate that it has been prepared by a cunning criminal who has taken the precaution of wearing gloves. On the other hand, many people who possess damp or greasy skins are unable to touch a document without leaving prints which may include sufficient detail, once they have been developed, to enable them to be identified.

The Latent Fingerprint

Fingerprints are formed by the deposit of the perspiration and fatty matter secreted by the sweat glands in the friction-skin of the hands, allied with any dirt which happens to be on the finger-tips.

On a polished, non-absorbent surface such as that of metal or glass, the deposit left after the evaporation of moisture remains on the surface where it usually can be seen if both lighting and viewpoint are carefully adjusted. On the other hand, on any but the most glossy paper surface, it is rare for a fingerprint to be visible prior to suitable treatment of the paper; indeed, most of the paper which is used for the production of documents will readily absorb the water and fatty matter which make up a fingerprint with little, if any, effect upon the appearance of its surface. The invisible fingerprints are generally referred to as "latent" fingerprints.

The Development of Latent Fingerprints

The methods which have been developed for converting invisible latent fingerprints into a state where they can be examined visually and in detail, a process which is termed "development," fall into three groups. These are methods based on:

(1) effects produced by the alteration in the surface properties of the paper caused by the absorption into the paper of the moisture and fatty matter which make up perspiration,
(2) the chemical treatment of the fatty matter contained in the perspiration to form a coloured deposit, and
(3) the conversion by chemical treatment of either the chlorides or the amino-acid-like constituents of the perspiration into coloured or radio-active products.

Development with Powders

The paper is dusted with a coloured solid, brushed or sprayed with a coloured solution or exposed to a coloured vapour in the hope that, on the areas affected by the secretions, a differential fixation or absorption of coloured matter will occur which will cause the fingerprints to be outlined in sufficient detail to enable their identification.

Over the years, innumerable powders have been tried and it seems probable that any highly coloured powder which is both finely divided and readily adherent to paper would prove effective, for all that is essential is that the powder will adhere more strongly to the slightly sticky latent print than to the rest of the paper surface.

Finely powdered graphite has long been in use for developing latent prints on the surfaces of light-coloured objects and has proved quite as satisfactory as any other coloured powder for developing prints on paper. Care should be taken when any powder, graphite in particular, is applied to paper, for many documents have been seriously defaced by its reckless and improper use.

If the graphite is lightly dusted on to the paper and the surplus lightly swept off with a very soft brush, it will adhere only to those portions of the surface where there is a latent print in a suitable state for development or where, incidentally, the paper has been abraded at the site of an erasure. The powder should be but lightly brushed, for if graphite is rubbed into the surface of the paper, it is practically impossible to remove it; any attempt to eliminate the resultant black smudges with a rubber will only make things worse.

If the graphite has merely been dusted on to the paper, then any which cannot be blown off or removed by gentle dusting with a very soft brush may be eliminated by gently dabbing with a lump of Plasticine, a proprietary modelling clay obtainable at most toyshops. After each application of the lump, a clean fresh surface should be made by paring the clay with a knife. The graphite will adhere most tenaciously to the Plasticine. This is the only material known to the author which can be relied on to remove loose dust from paper, but even this is ineffective if graphite has been rubbed into the surface of a document.

Effect of Time Interval on Development with Powders

It has been found that, on a paper with a surface which is hard and relatively non-absorbent, a latent print may be developed by the use of coloured powders even after a lapse of some weeks, but with most papers the sticky surface bearing the latent print which causes the powder to adhere slowly reverts to normal as the water evaporates and the fatty matter is absorbed into the paper.

In view of this and because of the inevitable lapse of time between the handling of an anonymous letter by the writer and its investigation by the application of a powder, this primitive method of development is hardly worth attempting, especially as superior methods based on other principles are available.

Development by Differential Absorption

Not only does the presence of a latent fingerprint render the surface of the paper slightly sticky but it also alters its absorptive powers for certain liquids and vapours; advantage is taken of this for the development of latent prints.

One of the most sensitive and safest tests for the presence of fingerprints is to fume the document with iodine vapour by holding it over a dish in which a small amount of solid iodine is gently heated. Great care must be taken to avoid breathing the iodine vapour which, in any but the slightest concentration, is extremely irritating to the air passages.[1]

The prints develop rapidly on this treatment but the colour is unsatisfactory for subsequent photography, a precaution which is essential because the developed prints are apt to experience rapid fading; in warm weather this can happen in a matter of minutes. The developed prints may be made more permanent by lightly spraying them with a dilute aqueous suspension of starch containing a little dissolved potassium iodide, which will convert the iodine deposit into the more stable blue complex known as "starch iodide."[2] Fuming with iodine will often yield evidence of the existence of prints which defy detection by most other treatments.

Instead of iodine, a mixture of five parts of iodine to four of mercury may be used for the fuming. When heated, this mixture evolves vapours of mercuric iodide which then concentrate on the latent prints as a red deposit which changes to yellow on standing. The developed prints are more stable than those revealed by iodine alone but, unfortunately, the reagent is much less sensitive.

Fingerprints on paper may also be revealed by quickly brushing the document with a solution containing iodine, potassium iodide and a mixture of the chlorides of metals such as calcium, magnesium or sodium. Such a solution constitutes a most sensitive reagent for the presence of latent fingerprints, erasures or secret writing, but otherwise has little to recommend it. The prints are rapidly developed as the solution is brushed on the document but are quickly merged in the general staining which attends the application of this reagent. After treatment, the general reddish-brown stain must be removed by the application of a concentrated solution of sodium thiosulphate.

Detection through the Chloride Content of Perspiration

The methods hitherto considered all have the limitation that evaporation and diffusion of the moisture of the latent prints render them of little avail for any but fresh prints, so it is not surprising that efforts have been made to develop methods which depend upon the reaction of chemical reagents with those constituents of the latent fingerprint which neither evaporate nor diffuse rapidly into the paper.

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[1] A mechanical device for simplifying the fuming of documents with iodine vapour has recently been described—"A Device for Developing Latent Impressions by Fuming" by K. Ross, *The Police Journal*. Oct.-Dec., 1957.

[2] "A Development in Iodine Fuming of Latent Fingerprints" by L. F. Wiebe and M. E. Miles, *Fingerprint & Identification Magazine*, No. 6, Vol. 38. Dec., 1956.

Perspiration, like many other body fluids, contains an appreciable concentration of chloride, generally in the form of sodium chloride, better known as common salt. Salt which is deposited in solution on paper cannot evaporate or decompose and has been shown to diffuse but slowly under normal conditions of storage. This means that any methods of development which depend on the utilisation of the chloride content of the latent print will be free from at least one of the limitations of the methods already considered.

In the conventional method of rendering visible the chloride component, the paper is treated with a dilute aqueous solution of silver nitrate which reacts with any chloride present to form white silver chloride. This silver chloride deposit, superimposed on the latent print, is then made visible by exposure to highly actinic light such as sunlight or the radiation from a mercury vapour lamp. The chloride blackens more rapidly than does any excess silver nitrate present.

The fundamental disadvantage of this method is that silver nitrate solution is a reagent which should be applied to a document with extreme reluctance for it can be counted on to produce a general staining which is difficult to prevent and virtually impossible to remove. Another limitation of the method is that some papers contain appreciable quantities of chloride derived from the water and other materials used in their manufacture: this residual chloride will cause an immediate general staining which might well mask any fingerprints developed by the treatment. In view of this, the chloride method of development in its present state must be regarded as of little more than theoretical interest.

Reactions with the Fatty Matter of the Latent Print

Aqueous solutions, even if not repelled by a greasy surface, are less readily absorbed, a fact which forms the basis of a method of developing greasy latent prints by brushing the paper with a dilute solution of either osmium or iron gallotannate. The prints are outlined by their differential absorption of these coloured ink-like liquids. Any such method must be regarded as of theoretical interest alone, for it would be folly to coat an important document with a dilute solution of ink or ink-like substances, in the hope of developing latent fingerprints.

Gaseous Development with Osmium Tetroxide

Far less objectionable is the development of the latent print by exposing the document to the vapour of osmium tetroxide, which will react with any fatty matter present to give a dark deposit of osmium metal thus forming a permanent print. This simple fuming process is very unlikely to harm the document but osmium tetroxide is expensive and the vapour is extremely irritating; a more fundamental objection is that the method lacks sensitivity so that a latent print has to have an appreciable fatty-matter content before there is any chance of its yielding an identifiable print.

Reactions with the amino-acids of the Latent Print

For many years it has been known that microgramme quantities of amino-acids can be detected by heating them with an acetone solution of an organic compound popularly known as "ninhydrin," when they give rise to what is usually described in the literature as a blue coloration; to the author, the colour is better described as a purple-red. It is only comparatively recently that this reaction has been used as a method for developing latent fingerprints on documents, but there is no doubt that it has proved to be by far the most satisfactory yet devised.

The latent print is developed by the application to the document of a freshly prepared 0·3 per cent. solution of ninhydrin in acetone. There has been some controversy as to whether it is better to brush or to spray this solution on to the paper. In skilled hands, either practice will probably prove satisfactory but, in the author's laboratory, the application of a fine mist from a well-designed glass spray to give a complete coverage has been found to give the best results.

Once the document has been evenly coated with the reagent, it is heated for about twenty minutes in an air-oven maintained at 80°C. At the end of this period, any latent prints will be revealed as faint purple-red outlines which photograph well, especially if a green filter is used with a Formalith plate to give maximum contrast.

In the many accounts of this process which have been published, little attention seems to have been paid to the necessity for making preliminary tests with the reagent before it is applied to the documents as a whole. Most ball-point pen inks, as well as some ordinary coloured inks, are readily soluble in acetone, so that writing on the document may become seriously smudged if the whole is recklessly sprayed without thought to the possible consequences. The author has recently seen a blackmailing letter, the subject of a criminal charge, where, as the result of careless spraying with ninhydrin solution in a fruitless effort to discover fingerprints, the writing has " run " to such an extent that all but a few words are completely illegible.

In view of this, spot tests should be made on an inconspicuous part of any writing with the ninhydrin solution before any general application of the reagent.

It also seems to have been overlooked that paper sized with gelatine or other protein material such as casein is still in extensive use. As might be expected, these protein-based sizes react with ninhydrin to give an all-over reddish-purple stain which cannot conveniently be removed. To guard against this happening, spot tests on a corner of the document should be made with the ninhydrin solution before any general spraying is undertaken.

The exposure of the documents to a high temperature after spraying is mainly to accelerate the reaction of the ninhydrin with the amino-acids of the latent prints. If, after spraying, the excess ninhydrin is not removed from the document by washing with acetone, which fortunately has no action on the developed prints, any further handling of the document is almost certain to result in the slow formation of a fresh crop of developed prints.

It should not be forgotten that ninhydrin is poisonous, so that spraying should be carried out in the open air or in a good fume cupboard. If any of the solution finds its way on to the hands, it should not be allowed to dry but should be removed by thorough washing as soon as possible.

General Precautions

Whenever it is proposed to treat a document with either vapour or liquid, it is a good rule to bear in mind that—

(a) any new procedure which is advocated may have been tested and found to be harmless on but a limited range of papers and inks, and

(b) new materials are constantly being pressed into service for the manufacture of paper and other writing media,

so that even a procedure which has been in general use for years and regarded as perfectly safe may cause serious staining when applied to a paper in which some new manufacturing process such as a novel type of surface finish has been adopted.

In view of this, small-scale tests should invariably be made before either liquid or vapour is applied to an important document, for it is far easier to avoid causing damage than to attempt to put matters right after the damage has been done.

The Development of Latent Prints by Induced Radio-activity

The ultimate in this direction has probably been reached in a method for developing latent prints on documents recently reported from Japan. In this, the paper is subjected to the action of formaldehyde vapour containing a radio-active carbon isotope. This radio-active formaldehyde is said to react with the protein-like materials present in the latent print to form, not a reddish-purple stain as is the case with ninhydrin, but an addition-product which, like the formaldehyde, is radio-active. If, after any excess formaldehyde has diffused out of the paper, the document is pressed against a suitable photographic plate contained in a light-tight container, a replica of any fingerprints present can be expected to be formed on the photographic plate by the radiation from the addition-product.

The practical limitations of this ingenious method are immediately obvious. In the first place, radio-active formaldehyde is not something which can be kept indefinitely in a bottle until required, for its radio-activity decays fairly rapidly, which means that fresh reagent would have to be purchased when required. Radio-active materials are not only expensive but have to be used with special equipment as well as by experienced operatives if they are to be handled with safety. This latter consideration is regarded as so important that the only suppliers of suitable radio-active material in this country, the Atomic Energy Commission, refuse to supply radio-active products unless they approve both the use to be made of them and the conditions under which they will be handled.

Secondly, radio-active formaldehyde, like ordinary formaldehyde, will react, not only with the latent fingerprints, but with a variety of other substances which might well be present. Gelatine and casein, both of which are widely used for sizing paper, immediately spring to mind in this connection and there may well be many others.

Fingerprints in Dust on Documents

The thin layer of dust which invariably collects on any document not specially protected will take fingerprints to perfection. These prints can easily be seen and need no development. With a fingerprint in dust, the residual dust, which is what is usually observed, constitutes a reversed version of what is usually termed a fingerprint, for the raised ridges of friction-skin on the finger-tips, from the sweat glands of which are derived the constituents of the latent print, pick up the dust so that what remains is an outline, not of the ridges, but of the spaces between. If desired, this negative print can easily be converted into the more usual positive print by photography.

If the colour of the dust contrasts well with that of the paper and the prints are on an area devoid of printing or writing which would obscure their details, it is preferable to photograph them without further treatment; any brushing, fuming or careless spraying is certain to spoil the outlines. Fingerprints in dust may be fixed on the paper by cautious spraying with a dilute solution of polyvinyl acetate in acetone.

If, for any reason, it is impracticable to photograph the prints as they stand, they should be removed from the document by some transfer process which can be counted on to preserve their outlines unchanged. Lifting the print with the special adhesive foil which has been developed for the purpose is quite satisfactory, but in the absence of this special product, a transfer process devised by the author some twenty years ago will prove both simple and effective.

The transfer sheet is prepared by fixing, in the dark room, a sheet of unexposed bromide paper in a plain solution of photographer's hypo; an acid hypo bath containing hardeners is useless for the purpose. The gelatine surface of the paper is softened and made absorbent by being soaked for a few minutes in water to which a little borax or a few drops of ammonia have been added. After removal from this alkaline solution, the sheet is drained and all excess liquid removed by dabbing with fluffless blotting-paper.

Before it dries out, the gelatine surface of the prepared sheet is pressed into contact with the dust print, care being taken to avoid slipping with consequent smearing of the print. On peeling off the transfer paper, the fingerprint will be found to be firmly adherent to the gelatine layer which is then hardened by drying.

If the dust is dark in colour, the bromide paper is used as it comes from the alkaline bath, but where it is of a colour which contrasts badly with white paper, the gelatine layer can be dyed to make a more suitable background for the dust. The simplest dye-bath can be made from coloured writing ink. Should a black background be required, this is best provided by exposing the bromide paper to light and developing it before fixing as described above.

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Therapeutic Abortion

By J. D. J. HAVARD, M.A., LL.B., M.B., *Barrister-at-Law*

R. v. Newton & Stungo

In his direction to the jury in *Newton & Stungo* [1] Ashworth J. recalled the words of counsel on the first day of the trial that the case was both unusual and important. It was also an excellent illustration of the way in which our criminal law deals with a situation in which the death of a mother has resulted from the unlawful termination of pregnancy. In cases where the abortion has been induced by a qualified medical practitioner it is unlikely that there has been any gross negligence, still less recklessness, as to the consequence of death of the mother. Where death occurs in such circumstances it is usually the result of some accidental sequel of the operation: This was partly true of the case about to be considered as it was expected that the woman would recover and she was already responding well to treatment when she suddenly died while talking to the Sister in the hospital. Under cross-examination the hospital registrar admitted that " the actual cause of death is exceedingly difficult to explain away. Why the patient should be all right at five minutes to seven, and dead at five minutes past seven is exceedingly difficult to explain away." He was, of course, speaking in the purely medical sense of the problem of determining the reason for the terminal event which led to her sudden death. There was, for legal purposes, no doubt that her death had been caused by the injection of utus paste for the purpose of inducing abortion.

However, in cases where the abortion is induced for some unlawful purpose, *e.g.*, the mere convenience of the woman, even the need to conceal the matter may lead to risks being taken outside the normal course of medical practice; see, *e.g.*, *R.* v. *Sumner* (1958) Glamorgan Assizes, in which a medical practitioner was convicted of manslaughter of a woman he had aborted. Having referred to the " shocking neglect " shown by the doctor, Glyn-Jones J. said: " I am satisfied your neglect of this woman was in your earnest desire that she should not be taken to hospital where what you had done to her would be discovered. You put her life in peril for your own selfish ends."[2] Hence in this case there was some evidence to suggest that Dr. Newton, who induced the abortion, had been negligent, though the jury ultimately found him not guilty of causing death through gross negligence. Fortunately for the prosecution there remained the illogical doctrine of constructive homicide whereby it was possible to convict Dr. Newton of manslaughter even though there had been no gross negligence as to the consequence of death. In the words of the judge: "If a person, in the course of, or as a result of carrying out, an illegal operation, caused the death of the woman, then he is guilty of manslaughter." The learned judge was merely reiterating a principle which has become unfortunately fixed in our criminal law. It follows that if an experienced obstetrician terminates a pregnancy and it is later shown that the operation was not carried out in good faith for purposes recognised as lawful, and the woman dies as an accidental result of the operation beyond anyone's control, then he will be guilty of manslaughter, notwithstanding the fact that the operation and after-treatment of the patient were conducted with consummate skill. The purpose of the abortion legislation was, of course, to protect the life of the unborn foetus and not the mother. It is difficult, by any reasoning, to justify the automatic conviction for manslaughter, and few people will disagree with Dr. Glanville Williams' observation that "in some ways the least defensible extension of the doctrine (of constructive manslaughter) in modern times was in connection with abortion."[3] Meanwhile the modern tendency to renounce the doctrine of constructive crime has made it increasingly difficult to justify convictions for manslaughter in the abortion cases where there has been no gross negligence as to the consequence of death, and the problem of reconciling these cases with decisions such as *Andrews* v. *D. P. P.*[4] is indeed a formidable one.

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[1] [1958] Crim.L.R. 469; for a detailed account of this case see [1958] *British Medical Journal*, i, 1242–1248 (May 24).

The statutory offence

It is in connection with the statutory offence of unlawfully procuring abortion that the case of *Newton & Stungo* is of most interest. It will be remembered that section 58 of the Offences against the Person Act of 1861 makes no express exception for the termination of pregnancy on medical grounds. The reason for this was that the operation of therapeutic abortion had not been developed as an established medical procedure at that time. Significantly the Infant Life (Preservation) Act of 1929, which created the statutory crime of child destruction, ostensibly to fill the gap in the law which existed where the child was destroyed during the process of birth, specifically excepted cases where the act had been done in good faith for the purpose only of preserving the life of the mother. Meanwhile the medical position had completely changed and the operation of therapeutic abortion had become an established and recognised procedure. It was, therefore, unfortunate that the opportunity was not taken at the same time to repeal the 1861 Act, so far as concerns the non-viable foetus. (Legally the term " abortion " covers the destruction of the unborn foetus at any time before spontaneous birth. The Infant Life (Preservation) Act applies only to cases where the child is considered in law as capable of being born alive. Section 2 of the act provides that evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive. In practice under modern medical treatment infants are sometimes born alive before the twenty-eighth week of pregnancy and may reach maturity.) An incongruous position has resulted whereby the destruction of a child capable of being born alive is specifically permitted in certain circumstances, whereas there is no express exception in the case of the non-viable foetus.

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[2] *Daily Telegraph*, July 12, 1958, p. 7, col. 4.
[3] [1957] Crim.L.R. 296.
[4] [1937] A.C. 576.

Fortunately, the framers of the 1861 Act included the word " unlawfully " with the result that the courts have not felt themselves constrained to hold all induced abortions contrary to the statute. Hence Macnaghten J. in *Bourne*,[5] having cited the proviso in the 1929 Act excepting the destruction of the child for the purpose only of saving the life of the mother, went on to say " No such proviso is in fact set out in section 58 of the Offences against the Person Act, 1861 ; but the words of that section are that any person who ' unlawfully ' uses an instrument with intent to procure miscarriage shall be guilty of felony. In my opinion the word ' unlawfully ' is not in that section a meaningless word. I think it imports the meaning expressed by the provision in section 1 (1) of the Infant Life (Preservation) Act, 1929, and that section 58 of the Offences against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso." ([1939] 1 K.B. 691 ; [1938] 3 All E.R. 618A, reports the learned judge as having said: " Those words express what, in my view, has always been the law with regard to procuring an abortion.") But, however overwhelming the logic of this reasoning, it is not entirely a sound legal principle to read non-existent words into a statute, and, as Dr. Glanville Williams has pointed out, the only legal principle on which an exception to the 1861 Act can properly be admitted, is the defence of necessity.[6] In other words, *Bourne* may be considered authority for the view that the defence of necessity is available if the act has been done in good faith for the purpose only of preserving the life of the mother.

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[5] [1939] 1 K.B. 687 ; [1938] 3 All E.R. 615.

It has been left for the courts to decide the extent of the necessity beyond which termination of pregnancy will be considered lawful. The matter is of considerable importance as it is essential that the established medical indications for the operation should coincide with those recognised in law as constituting the defence of necessity. The exception in the 1929 Act clearly contemplated those cases where the child had to be destroyed in order that the mother could be delivered without dying in the process. The great advances in ante-natal care during the last three decades have happily rendered such operations almost obsolete. Nowadays the danger is recognised early on in pregnancy and arrangements are made for delivery of a live child by caesarean section or for some other steps to be taken before the mother's condition becomes critical. Consequently it is now extremely uncommon for a doctor to be faced with the decision to destroy a child capable of being born alive in order to save the life of the mother. The medical indications for inducing abortion in early pregnancy are, however, quite different. There is not that sense of urgency and the woman's life is rarely in immediate danger. Unfortunately the courts have not faced squarely up to this fact and have endeavoured to justify the necessity of the medical indications for abortion by adopting an extremely wide construction of the words " preserving the life of the mother."

Mr. Bourne's test case

The issue was forced in 1938 by Mr. Aleck Bourne, a consultant obstetrician at the top of his profession, who notified the Attorney-General of his intention to terminate the pregnancy of a 14-year-old girl who had become pregnant as the result of having been shockingly raped by a soldier. The girl had been referred to him because it was clear that if her pregnancy was allowed to continue she would become a mental and physical wreck. There was no immediate danger to her life. The operation was carried out under accepted medical procedure and quite openly in the operating theatre of St. Mary's Hospital, London. Subsequently Mr. Bourne was charged under the 1861 Act, and stood his trial at the Old Bailey.

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[6] *Sanctity of Life and the Criminal Law*, p. 152.

At the trial, Macnaghten J., having ruled that the exception in the 1929 Act was available as a defence to an action brought under the 1861 Act, adverted to the difficulty of deciding what exactly constituted "preservation of life," and in particular, the question of differentiating between "preservation of life" and "preservation of health." "Take a reasonable view of the words 'for the preservation of the life of the mother,'" he told the jury. "I do not think that it is contended that those words mean merely for the preservation of the mother from instant death. . . . The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death." [7]

At this point it is clear that the learned judge was straining the words of the 1929 Act to cover a very different set of circumstances. As has been pointed out, the exception in the 1929 Act contemplated a situation in which the life of the mother is in immediate danger. Where it is decided, after the pregnancy has passed the twenty-eighth week, that continuation of the pregnancy will endanger the life of the mother, there is always a fair chance of terminating the pregnancy with the production of a live child, capable of reaching maturity, *e.g.*, by caesarean section. The medical practice in such cases is to wait so long as is consistent with the condition of the mother before terminating the pregnancy in order that the child may have the greater chance of survival. Any termination of pregnancy after the twenty-eighth week in circumstances which will destroy the child, or, what amounts to the same thing, where the child is believed to have no chance of surviving, will have been carried out because the mother's life is in immediate danger. The decision to adopt the exception in the 1929 Act was, therefore, singularly unfortunate, as the medical indications for destroying the non-viable foetus are very different. However, the decision having been made, the learned judge had to adopt an extremely questionable construction of the exception in the 1929 Act. He continued: "As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor, who in those circumstances, and in the honest belief, operates, is operating for the purpose of preserving the life of the mother." [8]

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[7] [1939] 1 K.B. 692–693: "and then at the last moment snatch her from the jaws of death" adds the report in [1938] 3 All E.R. 618F.

[8] [1939] 1 K.B. 693–694.

Effect of the Bourne Case

Informed medical opinion has construed this judgment as justifying therapeutic abortion in cases where it is necessary to preserve the life or health of the mother. It is doubtful whether Macnaghten J.'s judgment can be interpreted as justifying the termination of pregnancy for the purpose of preserving the health of the mother, with no qualification as to danger to her life. However, the medical view has been vindicated in subsequent cases. It would seem from the judgment of Morris J. (as he then was) in *Bergmann & Ferguson*[9] that the court will not look too narrowly into the question of danger to life where danger to health is anticipated. Finally, Ashworth J. in *Newton & Stungo* is reported as having said: " The law about the use of instruments to procure miscarriage is this: ' Such use of an instrument is unlawful unless the use is made in good faith for the purposes of preserving the life or health of the woman.' When I say health I mean not only her physical health but also her mental health." ' This statement must be welcomed as confirming that the law on the subject now corresponds with the accepted medical indications for terminating pregnancy. Although informed medical opinion has always taken this view, a large section of medical opinion is uninformed or incorrectly informed on the subject. Textbooks on medical jurisprudence, to which medical men are prone to turn when in doubt about the law, are notoriously inaccurate in the advice they offer concerning termination of pregnancy. As an example, we may take the book on medical ethics, which was published last year; as the first book on the subject to have appeared for many years, it was eagerly awaited by the medical profession. Each chapter is contributed by a recognised authority on the subject concerned. The chapter on abortion, having referred to the " Criminal Abortion Act of 1861 " directs the reader that, " It must be clearly understood that there are no exceptions to the rule, every time abortion is induced, for whatever reason, a felonious act of considerable magnitude is perpetrated."[10] The authority for this statement is apparently that no express exception is included in the 1861 Act. The *Bourne* case is regarded merely as an example of the administration of criminal justice by the courts. No mention is made of the passage in Macnaghten J.'s judgment where he said: " . . . if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave danger of being brought before this court on a charge of manslaughter by negligence."[11] The book received enthusiastic reviews in the medical press, none of which criticised the views stated concerning abortion.

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[9] 1948, unreported; see Glanville Williams, *loc. cit.*

[10] F. W. Roques in *Medical Ethics*, edited by M. Davidson, 1957.

Not surprisingly, many medical men are reluctant to carry out the operation for fear of criminal prosecution. Indeed it was the difficulty experienced by Mr. Bourne in obtaining anaesthetists willing to co-operate in therapeutic abortions which led him to invite prosecution in the hope of clearing up the confusion. One of the results of the confused medical views on the legality of therapeutic abortion is that many women satisfying both medical and legal indications for abortion are turned away, and have recourse to the back street " quack " abortionists where their lives are placed in peril. Ashworth J.'s statement on the law is, therefore, particularly welcome, and it is to be hoped that the case will be officially reported. This will, however, by no means exhaust the problems surrounding the legality of therapeutic abortion, and the subject is really one which requires legislation. Some medical indications for therapeutic abortion cannot be brought directly within the scope of any judgment which has so far been pronounced on the subject, *e.g.*, the so-called foetal indications where the foetus is known or believed to have been damaged in some way so that the birth of a child with gross malformation is expected. The most recently publicised of these cases is that where the mother contracts rubella (" German measles ") during early pregnancy. It is interesting to note that Lord Denning, in an address to a famous medical school, recently expressed the view that termination of the pregnancy in such cases was lawful, though he gave no reasons for his opinion.[12] As the law stands, such abortions can be justified only on the assumption that the birth of a malformed child would damage the mental health of the mother, which, of course, is not the real reason why they are carried out.

The burden of proof

The burden placed on the prosecution in actions brought under the 1861 Act is to prove that the operation was not carried out in good faith for the purposes already considered. Hence Macnaghten J. in *Bourne* told the jury " . . . the question you have got to determine is not are you satisfied that he did it in good faith for the purpose of preserving the life of the girl. The question is whether the Crown have proved the negative of that."[13] Again, Ashworth J. in *Newton & Stungo* is reported as having said "But although I have said that 'it is unlawful unless,' I must emphasise and add that the burden of proving that it was not used in good faith is on the Crown." The jury are not entitled to inquire whether the decision to terminate the pregnancy in the interests of the mother's health was medically correct, they are concerned only with the question whether the decision was reached in good faith. Hence Morris J. in *Bergmann & Ferguson* said to the jury "You are not concerned with the question as to whether Dr. Ferguson arrived at a right conclusion; you have not to decide whether Dr. Ferguson did or did not make a mistake . . . you are not here to weigh up whether Dr. Ferguson was correct in the view that she had formed. You have to be satisfied by the prosecution that she expressed a dishonest opinion, and that when she advised, if you think she did advise, the termination of pregnancy . . . you will have to consider whether you are persuaded by the evidence called by the prosecution that that lady gave a dishonest opinion, did not act in good faith, and was therefore advising something that was unlawful."

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[11] [1939] 1 K.B. 693.

[12] [1956] *British Medical Journal*, ii, 821.

At first sight this would appear to place a formidable duty on the prosecution where the abortion is carried out by a qualified medical practitioner. But in practice it is often found that a doctor who terminates pregnancy unlawfully will make certain departures from accepted medical practice in order to conceal the matter. Such is the integrity of the medical profession that abortions carried out under the accepted medical procedure are rarely, if ever, questioned, at any rate since the decision in *Bourne*. Medical men are acutely aware of the moral and legal implications of terminating pregnancy and a recognised procedure has been developed. The woman is referred to an obstetrician by a general practitioner, normally the woman's own doctor. It is in any case considered unethical for a consultant to see a patient without a letter of introduction from a general practitioner—a principle which corresponds roughly with the practice between solicitor and barrister. The obstetrician confirms that the woman is pregnant, and if he considers that termination of pregnancy may be indicated, he refers the woman to a recognised authority in the disorder concerned. If the indications are confirmed arrangements are made for the pregnancy to be terminated in a hospital or nursing home. The woman is requested to sign a form authorising the operation

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[13] [1939] 1 K.B. 695, the report in [1938] 3 All E.R. 621A spoils the continuity by quoting the learned judge as having said in the first sentence "is not whether you are satisfied."

(a normal procedure before any operation, but particularly in one of this nature) and is admitted to the hospital or nursing home the previous day for pre-operative treatment. The operation is carried out as a surgical operation and the woman retained in hospital or nursing home for some days afterwards. Termination of pregnancy is, on medical grounds alone, considered seriously as an operation which carries a definite hazard to the mother. Even where utus paste is injected, as opposed to the more usual method of curetting out the contents of the womb, the consensus of medical opinion is that the operation must be carried out in hospital. In answer to a question by the judge in the case about to be considered, Dr. Newton agreed that " Wherever it is done termination of pregnancy is fraught with risk." It should be pointed out that there is no economic reason why this procedure should not be followed in each case, as the operation is one which can be carried out under the National Health Service. Finally medical men are careful to charge only a reasonable fee for the operation when carried out outside the National Health Service, as acceptance of an excessive fee invites the suggestion that the abortion was induced for some unlawful purpose, *e.g.*, the mere convenience of the woman.

The facts of R. v. Newton & Stungo

Against this background it is now possible to consider briefly the case of *Newton & Stungo*. An unmarried Australian nurse, Miss C., suspecting herself to be pregnant on arrival in this country, consulted a general practitioner in Yorkshire. He confirmed that she was pregnant and did not see her again. She told him she was married, but he formed the opinion that it was unlikely that she was pregnant by her supposed husband unless he had accompanied her from Australia as the pregnancy appeared to be only between two and three months. The doctor was quite definite that there was no suggestion made either (1) That she did not want a child. (2) That anything should be done to terminate the pregnancy. (3) That the name and address of any doctor was asked for. He said she was in no way agitated or distressed, and that she appeared to take the confirmation of the pregnancy pretty calmly in view of his suspicions as to the legitimacy of the expected child. On the recommendation of a lady friend Miss C. then came to London and consulted a Dr. P, described as a specialist in psychiatry. Dr. P. said that he found her condition grave and that she was potentially suicidal. He charged her 5 guineas for the consultation and sent her to Dr. S. with a letter stating that she had missed three periods, that she was distressed and in an acute state of anxiety, and that she required Dr. S.'s advice and assistance. Dr. S., a gynaecologist, said that he examined Miss C. and, in view of his findings, advised her that it would be unsafe to curette out the uterus. He said that he recommended that she should go to hospital so that the abdomen could be opened and the uterus evacuated by caesarean section. He said that she asked him whether utus paste might be used, as she had seen it used a lot as a nurse. He said that she did not want to go to hospital and that he had sent her to Dr. Stungo making it clear to Dr. Stungo in an interview the following day that Miss C. did not want any form of major operation. Dr. S. charged no fee. Dr. Stungo, described as a psychiatrist, saw Miss C. and said that he came to the conclusion she was actively suicidal and ought to have her pregnancy terminated. He said he arranged an appointment for her with Dr. Newton over the telephone and discussed the case personally with Dr. Newton later the same day. Dr. Stungo said that his normal fee ranged between 5 and 7 guineas, but that he charged her only 3 guineas because she was a nurse. Dr. Newton, who had no specialist qualification in obstetrics or gynaecology, described himself as specialising in endocrinology. He said that in view of the opinions of the previous medical men who had seen Miss C., he decided to do an abortion. He said that he charged her £50 for the operation and a further £25 as he knew he would probably have to visit her several times after the operation. He said he accepted both sums in cash in advance as she was staying at a hotel and there was no one he could refer to. He admitted that the fee was high compared with what he would normally charge a nursing sister, and explained that he purposely made it high in order to discourage her from having anything done.

At this point it is relevant to consider the position of the doctors to whom Miss C. was successively referred. Counsel for the prosecution had this to say at the trial: " What the Crown suggest is that this was a convenient set-up under the cloak of medical attention whereby the law is dodged. You send the woman from one doctor to another, who eventually does it for £75." Accordingly Dr. Stungo was indicted as an accessory, though the judge accepted the submission of counsel that there was insufficient evidence to convict him. Dr. Stungo had kept careful notes of his examination, and, it will be remembered, had charged a very reasonable fee, not at all what might have been expected if he was obliging the woman for valuable consideration.

The operation

Next, it is important to consider the circumstances under which Dr. Newton carried out the operation. He said that he first saw her at 2.30 in the afternoon when he examined her and came to the conclusion that she was an immediate suicidal risk, and that he told her to go away and think about the situation and come back to see him later in the day if she still felt the same. He said that she returned at 5.30 p.m. still in a suicidal frame of mind and still refusing to go into hospital. Dr. Newton then injected utus paste into the womb and sent the woman back to the hotel by taxi. Miss C. did not sign a form consenting to the operation and no other person was present at the operation. Dr. Newton explained the latter point by saying that he had been used to working on his own for several years, and that he regarded the operation as a comparatively simple procedure. Later, it will be remembered, he admitted in answer to a question from the judge that wherever it is done termination of pregnancy is fraught with risk. The main line of defence was, of course, that Miss C. was said to have refused to go into hospital, and therefore it was necessary to carry out the operation in a consulting room. The expert witness for the defence, Professor McClure Brown, said of Dr. Newton's action: "From what I have heard I think he was in a difficult position and I can well understand how he came to arrive at the decision he did." He was, however, very careful to emphasise that he, personally, would not have done the same, and that he preferred to do such operations in hospital. More impressive was the evidence of Mr. Brews, gynaecological surgeon at the London Hospital, the expert witness for the prosecution, who insisted that injection of utus paste must be regarded as a surgical operation to be carried out in the operating theatre of a hospital and that the patient, if 3 months pregnant, should be kept in hospital for five to seven days. He refused to recognise Dr. Newton's practice as proper, and when asked by counsel for the defence what he thought ought to be done in such a case where the woman showed evidence of taking her life yet refused to go into hospital, he replied: "I cannot say that such a difficulty would justify a doctor in carrying out a procedure which unnecessarily endangered her life." Asked if it was his view that Dr. Newton should have sent the woman away and taken the risk of her committing suicide, Mr. Brews replied: "I do not think the risk of her committing suicide was any greater by sending her to hospital than in letting her go home to a hotel."

Admission to hospital

A further reason produced by the defence as justification for sending her back to her hotel was that, as a trained nurse, Miss C. would be capable of looking after herself. As things were, she became ill the same evening and was vomiting continuously the following morning. Dr. Newton was sent for and examined her.

He said that he could not ascertain whether the abortion was complete, but that he found no cause for alarm. Shortly afterwards Miss C. developed suppression of urine, an extremely serious complication. Her condition continued to deteriorate and on the third day after the operation Dr. Newton came to the conclusion that Miss C. had some retained products in the womb and decided to send her into hospital. He said that she still declined to go into hospital and he did not actually send her in till the following day. Throughout the whole of this period Miss C.'s condition was deteriorating and the prosecution were able to suggest that Dr. Newton's delay in sending her into hospital showed gross negligence or an intention to conceal the fact that he had aborted her for as long as possible. Dr. Newton admitted in cross examination that he might have made an error of judgment, but the judge interposed and said: "It goes further than that. On the Monday you had formed the view that there was something inside her which ought not to be there, and which had to be removed. That meant hospital. The longer she remained (in the hotel) the worse she would be?" To which Dr. Newton answered: "Yes." When counsel for the prosecution suggested that he had kept Miss C. in the hotel for purposes of concealment, Dr. Newton replied: "I had no thought for concealment. I thought she was taking time to recover."

The normal process in getting a patient into hospital is to contact the hospital and make arrangements for admission, alternatively to contact the Emergency Bed Service, if difficulty in getting a bed is anticipated. In the latter case, which Dr. Newton adopted with Miss C., it is essential to send a letter containing a description of the findings and treatment which has been given, as it may be some time before the doctor knows which hospital has been able to admit his patient, and he may have no opportunity of discussing the case with the hospital doctor before admission. Accordingly Dr. Newton sent a letter with Miss C. to the hospital. This letter stated "Please admit Miss Cook, aged 35, who is suffering, I believe, from an incomplete abortion. Severe 'flu about 10 days ago followed by miscarriage and now persistent vomiting. Will you kindly admit." It will be noted that the relevant information, namely, that Dr. Newton had himself injected utus paste into the womb for the purpose of inducing an abortion, was missing. Asked in cross examination why he omitted this information from the letter, Dr. Newton replied: "I wrote the letter in a hurry."

The hospital doctor (registrar) who took over Miss C.'s treatment said that he made a provisional diagnosis of incomplete abortion which he confirmed the following morning, when he came to the conclusion that her poor condition was due to kidney failure. He said that Miss C. had told him that Dr. Newton had aborted her, and that he then telephoned Dr. Newton to find out what he had done, as it might throw some light on the suspected kidney failure. He said that Dr. Newton denied that he had aborted Miss C. saying that she had come to him with 'flu and menstrual irregularity and that he had merely given her some tablets and sent her away. He said that Dr. Newton then telephoned daily to inquire after Miss C.'s condition until he told Dr. Newton that he would give him no further information on the progress of the case unless he came to see him. He said that Dr. Newton then visited him at the hospital and finally admitted that he had injected utus paste into the womb. Dr. Newton did not agree that he had withheld information about the abortion in the telephone conversation with the registrar and maintained that he had actually discussed the composition of the paste with the registrar during the conversation. However there was no reason to suppose that the hospital registrar was not telling the truth.

In view of her grave condition on admission Miss C. made a remarkable improvement. Unfortunately, as has been already mentioned, she unexpectedly died on the ninth day after admission. A post-mortem examination conducted by Dr. Camps confirmed that she had died from renal failure following upon an abortion. It might have been possible to explain Dr. Newton's behaviour following the operation on the grounds that he had actually done the operation in good faith, and had lost his head afterwards. But it was clear on the balance of the evidence that pregnancy had not been terminated in good faith, and the jury, which had retired for two and a half hours, found Dr. Newton guilty of unlawfully using an instrument with intent to procure the miscarriage of Miss C., and guilty of manslaughter in that he caused her death by unlawfully using an instrument. They found Dr. Newton not guilty of manslaughter on the grounds of negligence. It was then disclosed that Dr. Newton's name had been erased from the Medical Register for five years from 1942 when he was found to have issued certificates of epilepsy to enable men to evade serving in the forces. Dr. Newton was sentenced to two years' imprisonment for unlawfully using an instrument, and to three years' imprisonment for manslaughter, the two terms to run consecutively, making five years in all. In passing sentence Ashworth J. told Newton: "In my view this is a very grave case. The day of reckoning has come for you. You must have known what were the dangers to the lives of women on whom you practised this, if there were others. You must have known too what would be the consequences to yourself if you were convicted. This is not the first time that you have broken the law in regard to medical practice. For five years you were suspended for dishonesty. Now comes this. It comes from a man in Harley Street. It is in some ways even more sinister than it is in normal cases, I cannot take a light view of this."

From the medical point of view this case has served an extremely useful purpose. It has confirmed that the accepted medical indications for terminating pregnancy will be recognised as constituting the defence of necessity. Providing the operation is carried out in good faith for the purposes of preserving the life or health of the woman the doctors need have nothing to fear. The case also shows that the success of the prosecution in proving that the operation was carried out in bad faith depends largely on whether or not the accepted medical practice in therapeutic abortion has been followed. It is now up to the medical profession to re-assess its attitude towards therapeutic abortion and to condemn those doctors who refuse to co-operate on grounds that they fear criminal prosecution. In this way it may be possible to reduce the large volume of traffic which passes through the dangerous practice of the "quack" abortionist, as many of these women have been refused help by qualified medical men. From the legal point of view it is essential that statutory recognition be given to the medical indications for therapeutic abortion, so that the law no longer appears to depend on the doubtful practice of taking the words from one statute and employing them in another statute in a sense which they were never intended to convey.

Practice and Procedure

Orders to Return Offenders to Ireland

In R. *v.* McCartan, the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Ashworth JJ.: July 28, 1958) on a reference by the Secretary of State under section 18 (b) of the Criminal Appeal Act, 1907, gave the following guidance to courts on the way to deal with Irish offenders whom they thought should be ordered to return to Ireland:

The particular question in this case was whether a probation order, which included a term that M. should go to Ireland and stay there, was properly made. In the opinion of the court such an order could not be made. Section 3 of the Criminal Justice Act, 1948, provided that a probation order could be made requiring the probationer to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years; and subsection (2) provided that the probation order should name the petty sessional division in which the offender resided or would reside, and that the offender should be required to be under the supervision of a probation officer. In the light of those provisions it was clear that the courts of this country had no power to make a term of a probation order that the offender should go to Ireland and remain there. The proper order was to bind over the offender and to make it a condition of the recognisance that he returned to Ireland and did not return to this country for such period as the court thought fit. That was the order which this court had made in the case of *R.* v. *Flaherty* [1958] Crim.L.R. 556, when the court had stated that there was really no reason why British taxpayers should have to pay the considerable sum of money it cost to keep boys in Borstal training. In that case the court called upon the boy and said: " The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you do not land again in this country for at least two years." In the opinion of the court, that order could be made in the form of a common law recognisance although not, for the reasons stated, in the form of a probation order. [H.P.]

Central Criminal Court

Manslaughter—Indictment—Other counts charging other offences.

In R. *v.* Predore and Others [1] (Central Criminal Court, July 21, 22 and 23, 1958) the three defendants were charged with (1) Conspiracy to procure miscarriage, (2) Using an instrument to procure miscarriage and (3) Manslaughter. All pleaded not guilty. After he had been in the box for some time the first defendant, who arranged the operation and was present in the house when it was carried out but who took no active part in it, changed his plea to Guilty on counts 1 and 2 and this was accepted by the prosecution, the jury being discharged from verdict on count 3 in respect of him. The remaining two accused were found guilty on all counts. On a motion in arrest of judgment, on behalf of the third accused, which sought to distinguish *R.* v. *Smith* (1957) 42 Cr.App.R. 35, the Common Serjeant held that *R.* v. *Large* (1939) 27 Cr.App.R. 65, did not lay down that an indictment was bad *ipso facto* if it contained counts charging other offences in addition to a count charging manslaughter. The first defendant was sentenced to twelve months' imprisonment concurrent on each of counts 1 and 2 and the second and third defendants were sentenced to eighteen months' imprisonment concurrent on each count. [C.B.O.]

Note: A motion in arrest of judgment must be made after conviction and before sentence and must be founded upon an objection arising on the face of the record. Had the objection to the indictment been made before plea, this being the correct course, it would have been open to the judge to exercise his discretion by requiring the prosecution to opt on which count they would proceed. This decision confirms the practice of including in one indictment counts charging both manslaughter and using an instrument to cause a miscarriage in abortion cases despite Archbold, 33rd ed., p. 965, and Halsbury, 3rd ed., Vol. 10, p. 391, both quoting *R.* v. *Large*, *supra*.

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[1] For the Crown: *E. J. P. Cussen* (instructed by the Director of Public Prosecutions). For T. A. Predore: *Colin Nicholls* (instructed by the court). For V. H. Predore: *Victor Durand Q.C.* and *Mordecai Levene* (instructed by Frank E. Fine & Co., 62 Oxford St., W.1). For B. M. Dadzie: *B. Webb* (instructed by P. Rusk & Co., 127 King's Cross Rd., W.C.1).

Summary Justice

Post office

Charged with two offences of wilfully delaying a postal packet contrary to section 58 of the Post Office Act, 1953, Richard Morris, a postman, pleaded guilty and asked for 317 similar offences to be taken into consideration. The letters had not been interfered with and there was no question of larceny, only of laziness and lack of interest in his job. Morris was fined £50 with £10 10s. costs: Huddersfield Magistrates' Court (*Yorkshire Evening News*, July 17).

Prisons

Infringing prison regulations by taking tobacco into Birmingham Prison with intent that it should come into the hands of a prisoner, contrary to section 40 of the Prison Act, 1952. The defendant, who was employed on re-roofing a wing of the prison, said he felt sorry for a prisoner because " He didn't have a smoke." He was fined £10. Ford: Birmingham Magistrates' Court (*Birmingham Mail*, July 17).

Road traffic

An eighty-year-old driver was fined £10 for dangerous driving, contrary to section 11 of the Road Traffic Act, 1930, and was disqualified from holding a driving licence until he had passed another driving test. He had held a licence since 1907 and had a good driving record; there was no element of wantonness or recklessness in the offence; the defendant had driven six hundred yards along the wrong carriage-way of a by-pass, for which his explanation was that he had never seen a dual carriage-way before: Skipwith: Winchester Magistrates' Court (*Manchester Guardian*, July 23).

Taxicabs

On summonses for plying for hire without licence contrary to section 45 of the Town Police Clauses Act, 1847, two hire car drivers were fined 5s. and 10s. respectively; for permitting plying for hire without licence a hire car company was fined 20s. The summonses were brought by the Attorney-General at the request of taxicab owners after Oxford City Council had refused to prosecute. For the defence it was submitted that there must be an element of soliciting hire in order to constitute " plying for hire " but this submission was rejected: Savoury and Others: Oxford Magistrates' Court (*Daily Telegraph*, July 30).

Case and Comment *

BIGAMY

Marriage before decree nisi of nullity is made absolute

Wiggins v. Wiggins (otherwise Brooks) and Ingram

Probate, Divorce and Admiralty Division: His Honour Judge Carr, sitting as a special commissioner: [1958] 2 All E.R. 555.[1]

On October 4, 1954, W, a woman, obtained a decree nisi of nullity from H. On October 16, 1954 (before the decree nisi had been made absolute) W went through a ceremony of marriage with X. Subsequently the decree nisi was made absolute. X brought proceedings against W for a declaration, *inter alia,* that the marriage between himself and W be declared null and void on the ground that the marriage was bigamous.

Held, that although for most purposes a decree absolute of nullity acts retrospectively to the date of the purported marriage, for the purpose of deciding whether or not a marriage was bigamous, one must look at the facts as they existed at the time of the ceremony of marriage and not be deceived by the terms of the decree absolute. Accordingly W was guilty of bigamy, and X was entitled to the declaration which he sought.

Inverclyde (*otherwise Tripp*) v. *Inverclyde* [1931] P. 29 and *De Reneville* v. *De Reneville* [1948] P. 100 followed; *Mason* v. *Mason* [1944] N.I. 134 not followed. [D.C.]

Commentary. Where a marriage is void it is regarded, in law, as never having taken place and can be so treated by both parties without the necessity of any decree annulling it. So where a party to a void "marriage" remarries, the second ceremony is perfectly lawful. Where, however, the first marriage is voidable merely, and no decree of nullity has been obtained, a second marriage is bigamous according to Halsbury, Vol. 10, 664, Archbold, § 2555 and Kenny, p. 202, though no modern English authority is cited.

There can be little doubt that in a criminal case such a ceremony of marriage as that in the present case would be held to be bigamous. The words of the statute (Offences against the Person Act, 1861, s. 57), "Whosoever, being married, shall marry . . ." are plainly satisfied, for

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For X: *D. T. Hallchurch* (instructed by Bickley & Co., Birmingham). W did not appear and was not represented.

W. *was* married when she went through the second ceremony and, if she committed a crime then, the subsequent retrospective operation of the decree absolute could hardly undo that.

On the other hand an argument might be based on the proviso which exempts "any person who, *at the time of such second marriage*, shall have been divorced from the bond of the first marriage, or . . . any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." It might be contended that the use of the italicised words in relation to the divorce provision, and their absence from the nullity provision, imply that a declaration of nullity at any time before the trial would be an effective defence. It is thought, however, that such an argument would have little chance of acceptance.

The court said that the parties may well have been, and probably were, perfectly innocent in entering into the marriage. Presumably they thought that the decree nisi put an end to the marriage. Whether this belief would have afforded a defence in a criminal case is doubtful. In *R.* v. *Wheat and Stocks* [1921] 2 K.B. 119, the Court of Criminal Appeal said (it is arguable that it was merely *obiter*) that a bona fide and reasonable belief that a first marriage has been terminated by divorce is no defence; and a belief in the annulment of a voidable marriage seems to be substantially the same. *Wheat* has, however, been dissented from in both New Zealand and Australia and has been severely criticised in this country. See Glanville Williams, *The Criminal Law*, § 44.

EVIDENCE

Evidence against accessory—cross-examination as to character of witness

R. v. Rothery

Court of Criminal Appeal: Lord Goddard C.J., Devlin and Ashworth JJ.: July 7, 1958.[2]

R. was convicted of a number of offences of larceny and false pretences relating to motor-cars. R. was tried with D., his partner in a business relating to motor-cars. R. said in evidence that the trouble arose because D. had not kept proper documents. Thereupon D. cross-examined R. as to his character. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the effect of R.'s evidence at the trial was not only to exculpate himself but to blame D., and, where a person "has given evidence against any other person charged with the same offence," the Criminal Evidence Act, 1898, allowed that person to be cross-examined as to his character. The words of the statute meant that the prisoner must give evidence which in some way reflected on his fellow prisoner. In those circumstances (applying *R.* v. *Miller*, 36 Cr.App.R. 169) the court had no discretion to prevent a defendant cross-examining as to character. The law gave a right to a prisoner to cross-examine another prisoner who had given evidence against him. The appeal would, therefore, be dismissed. [H.P.]

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[2] For the appellant: *C. Cray* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *C. Raymond Dean* (instructed by the Prosecuting Solicitor, Leeds).

Commentary. Where two prisoners, A and B, are jointly indicted neither, of course, is competent as a prosecution witness, but each may give evidence either for himself, or for his co-prisoner under the 1898 Act: *R.* v. *MacDonnell* (1909) 2 Cr.App.R. 322. If A gives evidence, the effect of which is to inculpate B, B may cross-examine A as to his character under section 1 (*f*) (iii): *R.* v. *Hadwen and Ingham* [1902] 1 K.B. 882.

Where a prisoner is liable to cross-examination as to his character as a result of the operation of section 1 (*f*) (i) or 1 (*f*) (ii) of the Act, it would seem that the judge has a discretion to exclude such cross-examination. It is "the duty of the judge, when trying a charge of crime, to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused": *Harris* v. *D. P. P.* [1952] A.C. 694, 707. "In all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it": *Noor Mohammed* v. *R.* [1949] A.C. 182, 192. Both *Harris* and *Noor Mohammed* were concerned with the admissibility of similar fact evidence *in chief*, but the rule appears to be a general one. The present case appears to establish, however, that this general rule does not extend to section 1 (*f*) (iii). This is perfectly logical for, in this case, the exclusion of the cross-examination would operate unfairly against the co-prisoner.

In *R.* v. *Miller* the point in issue seems to have been rather a different one. The question was whether A's counsel had rightly asked a Crown witness a question which showed that his co-prisoner, B, had been in prison. It was held that question was properly put, in spite of the fact that it showed B to be of bad character, because it happened to be relevant to A's defence. No question arose as to whether B could cross-examine A as to his character though, no doubt, he would have been allowed to do so.

ROAD TRAFFIC

Driving under the influence of drink or drugs—disqualification—whether "special reasons" for not disqualifying

R. v. Wickins

Court of Criminal Appeal: Devlin, Donovan and Ashworth JJ.: July 14, 1958.[3]

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[3] For the appellant: *N. R. Blaker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *E. B. McLellan* (instructed by Messrs. Marshall Harvey & Dalton).

W. had pleaded guilty at quarter sessions to driving a motor-car under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle. The recorder found that W. was suffering from diabetes but that he was not aware of it at the time of the offence when he consumed a quantity of beer which, but for the diabetes, would not have affected his driving. The recorder stated that upon those findings of fact he was not entitled to say that there were " special reasons " for not ordering disqualification and, accordingly, he was bound to impose a disqualification for a period of twelve months. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the four conditions laid down in *Whittall* v. *Kirby* [1947] K.B. 194 were satisfied in the present case. It had been laid down in that case that a " special reason " must be (i) a mitigating or an extenuating circumstance, (ii) not amounting in law to a defence, (iii) directly connected with the commission of the offence, and (iv) one which the court ought properly to take into consideration when imposing punishment. *Chapman* v. *O'Hagan* [1949] 2 All E.R. 690 did not inhibit the court from applying that test which, in the present case, was satisfied. The recorder had taken the wrong view of the law but had made it clear that, had he taken the other view, he would have exercised his discretion. Accordingly, the appeal would be allowed. [H.P.]

Commentary. Section 15 provides that a person convicted of an offence under that section shall, " unless the court for special reasons thinks fit to order otherwise," be disqualified for at least twelve months from holding or obtaining a licence. The question whether, on facts found by the court, it is open to the court to hold that special reasons exist, is one of law: *Rennison* v. *Knowler* [1947] 1 All E.R. 302; *Duck* v. *Peacock* [1949] 1 All E.R. 318.

Driving without due care and attention—automatism—defendant suffering from pneumonia.

Police v. Beaumont

Basingstoke Magistrates' Court: June 18, 1958.[4]

On April 14, Miss B., who is sixty-seven years of age, was seen driving her car from Stroud to Godalming on the A30 road at a speed of between twenty and twenty-five miles per hour when the car suddenly sheered across the road and collided head-on with a heavy lorry travelling in the opposite direction. After the accident Miss B. was stated by two witnesses to have been slumped over the driving wheel, apparently in a state of coma. She was taken to hospital and pneumonia was diagnosed. While in hospital she made a statement to the police as follows:

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[4] For the defendant: *Keith Scott and Co.*, Solicitors, Gloucester.

"I was driving to Surrey to stay with friends and whilst passing through Basingstoke, I felt very tired and decided to go no farther than Odiham or Farnham where I could stay the night, and that is the last thing I could remember."

The police called medical evidence which confirmed that Miss B. was suffering from pneumonia; in cross-examination the doctor said that it was quite possible that she would not have noticed any pronounced symptoms before her sudden collapse. The police apparently based their case on Miss B.'s statement that she felt very tired. Miss B. stated in court that she remembered nothing of the accident and said that although she felt too tired to continue her journey to Surrey she felt no anxiety about driving to break her journey with friends near by.

The defence, quoting *Hill* v. *Baxter* [1958], submitted that Miss B. was not "driving" at the time of the accident, having suddenly collapsed from illness. The justices accepted this submission and dismissed the summons [KEITH SCOTT & Co. Solicitors].

Commentary. The case of *Hill* v. *Baxter* and the defence of automatism have been fully discussed by Mr. Prevezer, "Automatism and Involuntary Conduct" [1958] Crim.L.R. 361 and 440, and Dr. J. Ll. J. Edwards, "Automatism and Criminal Responsibility," 21 *Modern Law Review* 375. See also the commentary at [1958] Crim.L.R. 193.

In *Hill* v. *Baxter* it was said that "it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop."

To continue to drive when feeling sleepy is, no doubt, negligent. In the present case the accused admitted that she felt very tired; but the justices presumably felt that this was not enough in view of the medical evidence that she may not have noticed any pronounced symptoms.

The burden is on the accused who sets up automatism at least to introduce such evidence as may raise a reasonable doubt. The view of the Lord Chief Justice as stated in *Hill* v. *Baxter* would go further and hold that there is a burden of proof on a balance of probabilities on the accused. What course the justices took in this issue does not appear.

SHOPS

Sunday trading—whether a mobile shop is a "place"

Stone v. Boreham

Queen's Bench: Divisional Court: Lord Goddard C.J., Slade and Devlin JJ.: *The Times*, July 4, 1958.[5]

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[5] For the prosecutor: *Leslie Boreham* and *Mark Dyer* (instructed by Berrymans). For B.: *C. J. Crespi* (instructed by L. M. Symes, Woodbridge).

An information was preferred alleging that B, being a person carrying on retail trade or business at a certain place situate outside 106 Peterhouse Crescent, Woodbridge, did not close the place for the serving of customers on that day, which was a Sunday, contrary to sections 47 and 58 of the Shops Act, 1950.

The justices found that B was the owner of a motor-van which was equipped as a mobile shop; that on the day in question he had driven his van down Peterhouse Crescent; that he had stopped outside number 106; and that a person had come to him and had bought from him a packet of tea. The justices were of the opinion that B had not traded from a " place " within the meaning of section 58 of the Shops Act, 1950. They accordingly dismissed the information.

Section 58 of the Shops Act, 1950, extends the provisions of section 47 (which provides that every shop shall, with certain exceptions, be closed for the serving of customers on Sunday) " to any place where any retail trade or business is carried on . . ."

Held, dismissing an appeal, that it was clear from the decision of the Divisional Court in *Eldorado Ice Cream Co., Ltd.* v. *Keating* [1938] 1 K.B. 715 (in which it was held that a box-tricycle from which ice-cream was sold was not a place within the Act) that the provisions of the Act with regard to Sunday trading applied neither to a vehicle which was moving, nor to one which had been moving but which had come to a halt for the purpose of trading; and that the court was bound to follow that decision in the present case.

Per Lord Goddard C.J.: The purpose of these provisions of the Shops Act was, generally speaking, to prevent Sunday trading. If a mobile trader was allowed to trade on Sunday, he would gain an unfair advantage over his stationary competitor. This might be a matter for Parliament to consider.

Per Slade J.: It was desirable that there should be, within limits, an appeal beyond the Divisional Court in a criminal cause or matter. [D.C.]

Commentary. By section 74 (1) " ' shop ' includes any premises where any retail trade is carried on." Devlin J. pointed out that this was not an exclusive definition, and that it did not exclude the possibility of a mobile van being a shop. He declined so to hold, however, since the Scottish courts had held the contrary in *Cowlairs Co-operative Society* v. *Glasgow Corporation*, 1957 S.C.(J.) 51 (see [1958] Crim.L.R. 372) and it was desirable that there should be uniformity in the construction of the statute. An alternative way of upholding the conviction would be to hold that the place was not the van, but the ground on which it stood and this had received the support of a Scottish court in *Nixon* v. *Capaldi*, 1949 S.C.(J.) 155. Devlin J. rejected this way of distinguishing the *Eldorado* case, as involving " too nice reasoning."

Furthermore, to hold that every place where the van stopped was a place where the retail trade or business was carried on "would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense."

The Divisional Court, sitting as a final court of appeal in criminal matters, regards itself as bound by its own decisions in the same manner and subject to the same exceptions as the civil Court of Appeal: *Huddersfield Police Authority* v. *Watson* [1947] 1 K.B. 842, 846. *Cf. Melias, Ltd.* v. *Preston* [1957] Crim.L.R. 544.

SEXUAL OFFENCES

"Unlawful sexual intercourse"—meaning of

R. v. Chapman

Court of Criminal Appeal: Devlin, Donovan and Ashworth JJ.: July 28, 1958.[6]

C. was convicted at assizes of an offence against section 19 of the Sexual Offences Act, 1956, which provides that it is an offence for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. C. had taken an unmarried girl aged sixteen years and a few months from her parents' home and had intercourse with her. On appeal to the Court of Criminal Appeal it was contended, *inter alia,* on behalf of C. that the intercourse was not "unlawful" within the meaning of section 19 because, the girl being over the age of sixteen, it was not forbidden by law.

Held, dismissing the appeal, that it was curious that this point had not apparently arisen before. Although the Act of 1956 was a consolidating measure, no great assistance was to be derived from earlier statutes. The purpose of section 19 was to protect young unmarried girls, and that purpose would be wholly illusory if the prosecution had to prove that the girl had been taken from her parents for intercourse contrary to some positive enactment. This court thought that such protection applied in cases where the intercourse was not so forbidden. The word "unlawful" in section 19 meant "illicit," which meant outside the bond of marriage. Accordingly, the conviction would be upheld. [H.P.]

Commentary. Section 19, in effect, re-enacts section 7 of the Criminal Law Amendment Act, 1885.

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[6] For the appellant: *I. A. Kennedy* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Inskip* (instructed by the Town Clerk, Southampton).

It appears that a Scottish court held, in construing section 5 of the 1885 Act, that intercourse was " unlawful " if no valid marriage existed between the parties: *H.M. Advocate* v. *Watson* (1885) 13 S.C.(J.) 6. See *Sexual Offences. A Report of the Cambridge Department of Criminal Science* (ed. L. Radzinowicz), 330. A similar view is, apparently, held in America: " Sexual intercourse between husband and wife is sanctioned by law; all other sexual intercourse is unlawful ": Perkins on *Criminal Law*, 115.

Adultery has not been treated as a crime in the temporal courts since the Restoration, when a statute of 1650, which made it a capital offence, was repealed. There is, however, evidence that true bills of indictment for adultery were sometimes returned before 1650 (see 29 *Law Quarterly Review*, 57) and adultery has always been regarded as unlawful at common law in the sense that contracts to facilitate it have been treated as totally ineffective. See Cheshire and Fifoot, *Law of Contract* (4th ed.), 275.

There is, therefore, some persuasive authority in favour of the courts' ruling. Furthermore, the effect of the defence's argument would have been to substitute " sixteen " for " eighteen " in section 19, which could hardly have been Parliament's intention.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* WILKINS, the court (Lord Goddard C.J., Slade and Devlin JJ.: June 30, 1958) reduced a sentence of eighteen months' imprisonment to one permitting immediate discharge. W. had been convicted at quarter sessions of larceny while employed in the public service. W., who was a man of fifty years of age, had been employed as a civilian clerk at army headquarters and had an excellent character. In the course of his employment W. had to handle some quite substantial sums of money and the present offences were committed when he kept back small sums out of the moneys in his possession. In all W. had £28. The jury gave a strong recommendation to mercy. The court stated that the sentence was too severe. W. had lost his job, forfeited his pension and brought disgrace upon himself and his family. An appropriate sentence might have been three months' imprisonment and, as W. had already served just three months, the sentence would be altered to one which would permit W.'s discharge the next morning.

In R. *v.* HUGHES, the court (Donovan, Havers and Diplock JJ.: July 7, 1958) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. H. had been convicted at a Crown Court of wounding his wife with intent to do her grievous bodily harm. H., who was a man of twenty-nine years of age, had two convictions as a juvenile for larceny and had been fined in 1951 and 1952 for disorderly behaviour, but he had never previously committed any offence of the present kind. The present offence was committed when H., who was separated from his wife, came across her, apparently by chance, at the house of a friend. A quarrel ensued in the course of which H. took out a knife and stabbed his wife. The injuries caused were in the upper arm, in the shoulder and in the forehead and, though not very serious wounds, seven stitches were required. Immediately after the incident H. gave himself up to the police. The court stated that any case of wounding where a knife was used was rightly regarded as a serious matter but, in the case of husband and wife, passions were sometimes aroused which were not present in ordinary cases. Having regard to H.'s record and the fact that he did not cause any serious injury and that he obviously repented of it immediately afterwards, the court thought that the appropriate sentence was one of eighteen months' imprisonment.

In R. *v.* Boardman and Powis, the court (Donovan, Havers and Diplock JJ.: July 7, 1958) refused B.'s application for leave to appeal against sentence and reduced P.'s sentence in the following circumstances. B. and P. had been convicted at quarter sessions of the larceny of eight hundredweights of brass swarf. B., who was a man of thirty-six years of age, had no previous convictions and was sentenced to twelve months' imprisonment. P., who was also a man of thirty-six years of age, had a number of previous convictions including larceny, burglary and taking away a motor-vehicle without the owner's consent, and he was sentenced for the present offence to five years' imprisonment. Imposing the sentence upon P., the chairman said: " You have a record here which shows perfectly clearly that you knew very well what you were doing and you took the risk of stealing and committing this crime." Imposing the sentence upon B., the chairman said: " There is very little to choose between you and P., but, on the other hand, you have a record which is quite clean, so far as we know, and we take that into consideration." The court stated that, having regard to the disparity in the sentences and to the remarks of the Chairman, it was quite clear that P. was sentenced very largely on his past record. That seemed very much like punishing him again for his previous crimes. B., because of his record, had some claim to a degree of leniency which was absent in the case of P.; but withholding leniency was one thing and inflicting heavier punishment for a record was another. In the circumstances a sentence of two years' imprisonment was appropriate in P.'s case and B.'s application for leave to appeal would be refused.

Preventive Detention

In R. *v.* Kelly, the court (Devlin, Donovan and Ashworth JJ.: July 21, 1958) reduced a sentence of eight years' preventive detention to one of four years' imprisonment. K. had pleaded guilty at a Crown Court to shopbreaking and larceny and three other offences were taken into consideration. K., who was a man of thirty-six years of age, had four previous convictions as follows: in 1944 for obtaining credit by fraud he was bound over; in 1945 for shopbreaking, burglary and other offences he received two years' imprisonment (twenty-four other cases being taken into consideration); in 1948 for larceny and taking away a motor-car he received nine months' imprisonment (three other offences being taken into consideration); and in 1953 for housebreaking he received three years' imprisonment. K. had been unemployed for twelve months before the present offence. The court stated that in their opinion the time had not yet been reached when preventive detention should be imposed. A sentence of four years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948, was, in the circumstances, the appropriate sentence.

In R. *v.* BULLOCK, the court (Devlin, Donovan and Ashworth JJ.: July 21, 1958) reduced a sentence of eight years' preventive detention to one of two years' imprisonment. B. had pleaded guilty at a magistrates' court and had been sentenced by quarter sessions for stealing a purse from a shopping bag from a young woman in a queue. The purse contained £3 2s. 8d. Another offence, committed in 1954, of fraudulent conversion of £8 14s. 0d. was taken into consideration. B., who was a man of about forty-seven years of age, had seven previous convictions as follows: he was bound over in 1939 (for obtaining credit by fraud) and in 1941 (for stealing £4 10s.) and again in 1945 for housebreaking; in 1949 he was sentenced to eighteen months' imprisonment for housebreaking; in 1953 he received six months' imprisonment for the larceny of £35 as a servant; in 1956 he was sentenced to three months' imprisonment for the larceny of £12 as a servant; and in 1957 he was sentenced to eighteen months' imprisonment for stealing a purse from the person. The court stated that, having regard particularly to the intervals between convictions, this was not the sort of record which deserved as yet a sentence of preventive detention. Neither the present offence nor the offence taken into consideration was very serious and, as the sentence ought to bear proper relation to the gravity of the offence, a sentence of two years with an order under section 22 of the Criminal Justice Act, 1948, was appropriate in the circumstances.

Probation

As to the invalidity of a probation order with a special condition that the offender returns to Ireland, see R. *v.* MCCARTAN, reported *ante*, p. 614.

Bind over

As to common law bind over subject to a condition that the offender returns to Ireland and remains there, see R. *v.* MCCARTAN, reported *ante*, p. 614.

Disqualification from driving

See R. *v.* WICKENS reported *ante*, p. 619.

Acts and Orders *

Defence Regulations

Land Powers (Defence) Act, 1958 (6 & 7 Eliz. 2, c. 30). Certain emergency powers are terminated and in some cases replaced by new powers. The following Defence (General) Regulations, 1939, are revoked and cease to have effect at the end of December 31, 1958: Regulations Nos. 50 (power to do work on land); 51 (taking possession of land); 51A (power to work minerals); 52 (use of land for purposes of H.M. Forces); 85 (entry upon, and inspection of land). New provisions are made under which an Order in Council may authorise the execution of Military Manoeuvres under the provision of section 1 of the Military Manoeuvres Act, 1897, and under which a Secretary of State or the Admiralty may by order direct the use of land for defence training purposes for a limited period of twelve months. Section 7 of the Military Manoeuvres Act, 1897, as extended by section 4 of the Military Manoeuvres Act, 1911 (which makes it an offence to obstruct or interfere with in certain ways the holding of military manoeuvres on authorised land), apply to the land used under the provisions of this Act for military purposes or defence training (ss. 2, 6). Powers to enter upon land for various purposes are conferred on any person authorised by various Ministers and by local authorities (ss. 9, 10, 15, 16 and 21). Any person who wilfully obstructs a person acting in the exercise of these powers of entry is made liable on summary conviction to a fine not exceeding £20 (para. 2 of First Schedule).

Litter

Litter Act, 1958 (6 & 7 Eliz. 2, c. 34). Operative August 7, 1958. This Act makes it an offence for any person to drop or leave litter in any place in the open air to which the public are entitled or permitted to have access without payment, unless this is done with the consent of the owner of that place or with other lawful authority. For the purposes of this Act any covered place open to the air on at least one side and available for public use is treated as being a "place in the open air" (s. 1 (1)). In England and Wales proceedings for an offence committed within their area or on land controlled or managed by them, may be brought by a County, County Borough, Metropolitan Borough, non-county borough, urban or rural district council, by the Common Council of the City of London, or by a joint Board constituted solely of two or more such councils, and by a joint board such as is provided for by section 8 of the National Parks and Access to the Countryside Act, 1949. These powers are without prejudice to the powers of any other person to take such proceedings (s. 1 (2)). In Scotland an offence may be prosecuted in any court of summary jurisdiction within the meaning of the Summary Jurisdiction (Scotland) Act, 1954, having jurisdiction in the place where the offence was committed. The Act applies to England, Wales and Scotland, but does not extend to Northern Ireland.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

The penalty for contravention is a fine not exceeding £10 (s. 1 (1)).

London Traffic

Restrictions are imposed on the sale of goods from vehicles and on the waiting, loading and unloading in the street of vehicles in an area in the north-west of Mayfair in the City of Westminster. The Regulations apply between 8.30 a.m. and 6.30 p.m. on Mondays to Fridays and between 8.30 a.m. and 1.30 p.m. on Saturdays, with the exception that Regulation 2 (which restricts the sale of goods from vehicles) applies at all times except Sundays, and Regulation 5 (which restricts the manner of loading and unloading vehicles) applies at all times. The Regulations are complementary to the Parking Places (Westminster) (No. 1) Order, 1958 (S.I. No. 549; [1958] Crim.L.R. 408), which designates and makes provision as to parking places on certain of those streets at which charges may be made by the Westminster City Council for vehicles left in the parking places. These Regulations apply to those parts of streets in the area concerned which are not designated as parking places by the last-mentioned Order, save that Regulation 5 applies to all parts of those streets whether designated as parking places or not. Operative July 10, 1958. WESTMINSTER (WAITING AND LOADING) (RESTRICTION) REGULATIONS, 1958 (S.I. No. 1094).

For penalties for contraventions see Regulation 6 of these Regulations.

Magistrates' Courts

First Offenders Act, 1958 (6 & 7 Eliz. 2, c. 31). Restrictions are imposed on the imprisonment by magistrates' courts of first offenders. A magistrates' court is not to pass sentence of imprisonment on a first offender of or over the age of twenty-one unless the court considers that no other method of dealing with him is appropriate, and in considering this the court must have regard to the information which a court is already required to take into account under the provisions of section 17 (2) of the Criminal Justice Act, 1948, before passing imprisonment on a person under twenty-one years of age (s. 1 (1)). Where the court does impose imprisonment on a first offender of or over the age of twenty-one it must state the reasons for its opinion that no other method of dealing with him is appropriate, as required by section 107 (3) of the Magistrates' Courts Act, 1952, in the case of the imprisonment of a person under twenty-one years old (s. 1 (2)). For the purposes of this Act a person is to be treated as a first offender if, but only if, he has not since the age of seventeen been convicted of any other offence except an offence not punishable with imprisonment. Convictions for which the offender has since the age of seventeen been placed on probation or granted an absolute or conditional discharge may rank as previous offences for the purpose of this Act, and section 12 of the Criminal Justice Act, 1948, or section 9 of the Criminal Justice (Scotland) Act, 1949 (which provide that for certain purposes conviction for which the offender is placed on probation or granted an absolute or conditional discharge shall not count as a conviction), do not apply for the purposes of this Act. The Act is operative July 7, 1958. It does not extend to Scotland or Northern Ireland.

Marriage

Marriage Acts Amendment Act, 1958 (6 & 7 Eliz. 2 c. 29). Operative January 1, 1959. Under the provisions of the Marriage Act, 1949 (12, 13 & 14 Geo. 6, c. 76), certain offences may be committed by a person who wilfully and knowingly solemnises a marriage other than in the places specified in the Act, including, *inter alia*, certain places of worship registered for the solemnisation of marriages. This Act is now amended so as to enable places of worship to be registered for marriages less than twelve months after first being used for worship, provided certain conditions are satisfied. Certain consequential amendments are also made.

Matrimonial Causes

Maintenance Orders Act, 1958 (6 & 7 Eliz. 2. c. 39). Provision is made, *inter alia*, for certain maintenance orders to be enforced by the attachment of sums falling to be paid by way of wages, salary or other earnings, or by way of pension; and the court may order the defendant or an employer of the defendant to furnish the court with particulars of the defendant's earnings. Failure to comply with the order of the court or to comply with an attachment order is an offence. A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other enactment, comply with the order (s. 10 (1)); and if at the time when a copy of the attachment order is served on the employer that person has not in fact employed the defendant at any time during the preceding four weeks, he shall forthwith give notice in writing to the court which made the order in the form prescribed by the Act (s. 10 (4)). Where proceedings relating to an attachment of earnings order are brought in any court the court may, before or at the hearing, order the defendant to give certain particulars relating to his earnings and to the name and address of his employer, and order the employer or any person appearing to the court to be an employer of the defendant to give to the court certain particulars as to the defendant's earnings. In the case of proceedings before a magistrates' court the order may be made before the hearing by any justice of the peace acting for the same petty sessional area as the court in which the proceedings have been brought (s. 11).

Any person who (a) fails to comply with the provisions of section 10 (1) and (4) or an order made under section 11; or (b) gives a notice under section 10 (4) which he knows to be false in a material particular; or (c) recklessly gives a notice or statement which is false in a material particular, shall be guilty of an offence. It is a defence, however, for a person charged with failing to comply with the directions of an attachment order under section 10 (1) to prove that he took all reasonable steps to comply with the order.

For penalties for contraventions, see section 15 of the Act.

Medicine

Opticians Act, 1958 (6 & 7 Eliz. 2, c. 32). Provision is made for the registration of opticians and the enrolment of bodies corporate carrying on business as opticians, and a professional body, a General Optical Council, is established, which is to control and regulate the practice of opticians and the conduct by such bodies corporate of their business as opticians. Restrictions are imposed on the testing of sight and the supply of optical appliances. A person who is not a registered medical practitioner or registered ophthalmic optician is not to test the sight of another person, exception being made in the case of certain medical or ophthalmic students. A person who contravenes this provision is liable on summary conviction to a fine not exceeding £100 or on conviction on indictment to a fine not exceeding £250 (s. 20). A person who is not a registered medical practitioner or registered optician may not sell any optical appliance unless the sale is under the supervision of one of those persons. Certain exceptions are made in the case of the supply of optical appliances to or in pursuance of arrangements made with a Minister of the Crown or Government Department or any body on whom functions are conferred under the provisions of the National Health Service Act, 1946, or the equivalent enactments for Scotland and Northern Ireland. Exceptions are also made in the case of the sale of optical appliances to a manufacturer of or dealer in optical appliances for the purposes of his business, to hospitals and similar institutions and their governing bodies and for export. It is a defence under this section for the defendant to prove that he sold the appliance as an antique or second-hand article and that he neither knew nor had reason to believe that the appliance was bought for optical use. The penalty for contravention of this section is a fine not exceeding £100 on summary conviction or £250 on indictment (s. 21). It is an offence for any unregistered person to use the title of or pretend that he is a registered optician when he is in fact not on any register; and similar offences are committed by bodies corporate who wrongly use such titles or pretend that they are enrolled on the lists of registered opticians. The penalty for contravention is a fine not exceeding £100 on summary conviction or £250 on indictment (s. 22). Special provision is made for certain relatives or the personal representatives of a deceased registered optician or the trustee in bankruptcy of a bankrupt registered optician to carry on the business or practice of the optician for limited periods (s. 23). Where an offence under the Act has been committed by a body corporate and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or similar officer of the body corporate or any person purporting to act in such capacity, then he as well as the body corporate shall be deemed to be guilty of that offence and be liable to be proceeded against and punished accordingly (s. 24). The Act is operative on a day to be appointed by Order in Council; and different days may be appointed for the operation of different provisions. The Act extends to Northern Ireland.

Merchant Shipping

Certain provisions of the Oil in Navigable Waters Act, 1955, are brought into force. These are subsections (3) and (4) of section 2, which create additional prohibited sea areas within which the discharge of oils of a persistent character is prohibited. Operative July 26, 1958. OIL IN NAVIGABLE WATERS ACT, 1955 (COMMENCEMENT NO. 2) ORDER, 1958, S.I. No. 1057.

For penalties for contraventions, see section 6 of the Act of 1955.

An additional sea area around the coast of the Australian mainland and Tasmania, within which the discharge by tankers of certain oils and mixtures containing oils is prohibited under sections 1 and 2 of the Oil in Navigable Waters Act, 1955, is created by this Order so as to give effect to the provisions of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. Operative July 26, 1958. OIL IN NAVIGABLE WATERS (PROHIBITED SEA AREAS) (AUSTRALIAN ZONE) ORDER, 1958, S.I. No. 1058.

For penalties for contraventions, see section 6 of the Act of 1955.

The Oil in Navigable Waters (Exceptions and Exemptions) Regulations, 1956 (S.I. No. 898) are revoked and re-enacted with amendments. The principal changes are (1) provision is made for the exception from the operation of section 1 (1) of the Act of ships of under 500 tons gross tonnage or ships for the time being engaged in the whaling industry, in respect of discharges of oil or oil mixtures into certain areas specified in Parts III or IV of the Schedules to the Act or designated by the new order under subsection (3) of section 2 of the Act. These areas differ according to whether the ships are tankers or otherwise; and the change is made to coincide with the operation of S.I. No. 1058, above; (2) ships other than tankers which use bunker fuel tanks for the carriage of ballast water, and which are either of under 80 tons gross tonnage or exempted by the Minister from the requirements of the Oil in Navigable Waters (Ships' Equipments) Regulations, 1957 (S.I. 1957, No. 1424), are permitted, in certain circumstances, to discharge oil contaminated ballast water into a prohibited sea area; and (3) a special exception relating to discharge of oil and ballast water by tankers of 500 to 2,500 tons gross has been revoked. Operative July 26, 1958. OIL IN NAVIGABLE WATERS (EXCEPTIONS AND EXEMPTIONS) REGULATIONS, 1958, S.I. No. 1060.

The Oil in Navigable Waters (Exceptions and Exemptions) Regulations, 1956 (Amendment) Regulations, 1958, S.I. No. 1059, operative July 1, 1958, made temporary provision in respect of certain ships, but these Regulations have since become revoked and re-enacted by S.I. No. 1060, above.

Road Traffic

The procedure which county councils are required to follow on receiving registration books from the new owners of vehicles is further simplified, and it is further provided that such councils shall on application supply without charge to other local authorities particulars concerning vehicles registered with them, in order that the other authorities may carry out their functions in relation to parking places designated under the Road Traffic Act, 1956. The Regulations of 1955 (S.I. No. 1664) are amended accordingly. Operative July 9, 1958. ROAD VEHICLES (REGISTRATION AND LICENSING) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 1069).

Scotland

Solicitors (Scotland) Act, 1958 (6 & 7 Eliz. 2, c. 28). The law relating to solicitors and notaries public in Scotland is amended, and the previous Acts of 1933 and 1949 are amended accordingly. The penalty for contraventions of the 1933 Act, which was formerly £50 or up to one month's imprisonment or both, is amended by raising the maximum fine from £50 to £100 (para. 8 of 2nd Schedule).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

48. *Larceny Act*, 1916, *s*. 2; *Gas Act*, 1948, *Sched. III, para*. 29.

Can gas be stolen after passing through a "master" meter and obtained by the user of a "check" meter by forcing the coin box and using a coin (1s.) to obtain a gas supply over a period?

I am unable to consult the cases referred to in Archbold, 33rd ed., para. 976. Am I wrong in thinking that there is some difference in fraudulently obtaining gas "before" and "after" it has passed through a measuring device such as a meter? In the cases mentioned in Archbold it appears that convictions were secured in relation to larceny of gas taken from the suppliers' side of the meter. The Gas Act, 1948, Sched. III, para. 29 refers *inter alia* to "fraudulently abstracting . . . gas of the Board. . . ."

Does this mean that the Gas Boards have a statutory power to refrain from prosecuting for the major crime of larceny and can in their discretion prosecute for an offence which appears to be akin to larceny but carries a maximum penalty of a fine of £5?

Alternatively does the provision in the Gas Act referred to mean that after gas has been supplied it becomes a contract debt and any offence arising is only punishable under that Act? [F.M.H.]

ANSWER

The meter is important only to determine the ownership of the gas at the point where it has been abstracted from the pipe.

Until such time as the gas has passed through the final meter determining the price which the consumer is to pay for that gas or otherwise regulating the contractual position between the consumer and the Gas Board it remains the property of the Board and can be stolen from the Board by any person who abstracts it including the consumer for whom it was otherwise intended. But once the gas has passed through the consumer's final meter in cannot be stolen from the Board although it may, of course, be stolen by some other person from the consumer.

This general position is not affected by the gas having passed through some master-meter if it has not yet reached the 'check' meter or coin-box which determines the contract between consumer and Board.

As I understand the question above, the coin-box has been forced and a coin (1s.) then used to operate the meter so as to release one shilling's worth of gas. In my view the consumer in this case would probably be guilty of larceny of the gas since it had never been supplied to him under the terms of his contract, so that, in the circumstances, he must have known that it remained the property of the Board. Furthermore since he had only used the Board's own money he had really not paid for the gas at all and, as in *Ferens* v. *O'Brien*, 11 Q.B.D. 21 (which was a case on water), he would be guilty of larceny. The somewhat complex legal position which thus arises does not pertain in exactly similar circumstances in the case of electricity, since the Larceny Act, 1916, s. 10, expressly enacts that any person "who . . . maliciously or fraudulently abstracts . . . consumes or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny."

The legal doubts in the case of gas are, however, removed by the Gas Act, 1948, Sched. III, para. 29, which expressly creates an offence in the case of fraudulent abstraction of gas, although the penalty is limited to £5.

It is quite true that the Gas Boards therefore have a statutory power to refrain from prosecuting for a major crime of larceny and can instead take less serious but much simpler proceedings under the provisions of the Gas Act. No doubt the penalty of £5 is usually considered to be adequate. [M.D.]

Letters to the Editor

Driving Licences—Epilepsy

Dear Sir,

I refer to your commentary on p. 551 of the August edition. The magistrates in the case reported allowed an appeal against a decision of the licensing authority refusing a driving licence to an applicant who, three years before, had suffered an epileptic attack. It may well be that in the particular case the magistrates decided on the evidence that the applicant did not still suffer from epilepsy but your commentary is mistaken in suggesting that they *must* have reached this decision.

Subsection (5) of section 5 of the Road Traffic Act, 1930, provides that on appeal the court may make such order as it thinks fit. Presumably, therefore, the magistrates are not bound, as the licensing authority is, by the absolute veto contained in subsection (2) against the grant of a licence to an epileptic. A self-confessed epileptic has no right of appeal (*Hepworth's* case) but the licensing authority before refusing the licence may have been satisfied on other information that the applicant was an epileptic and an appeal might properly come before the magistrates in such circumstances.

Thus, the magistrates might decide in the case of an applicant whom they found to be suffering from epilepsy that nevertheless because of his controlled treatment or for some other reason it was safe for him to drive.

In other words, subsection (5) seems to give to the magistrates a discretion which is not given to the licensing authority.

This interpretation is admittedly a matter of controversy.

Yours faithfully,
J. H. C. PHELIPS,
Deputy Clerk of the Council.

Worcester.

[Professor J. C. Smith writes: It is true that section 5 (2), in terms, requires the licensing authority to refuse the licence only " If, *from the declaration,* it appears that the applicant is suffering from any such disease or disability as aforesaid . . ." But it can hardly have been the intention that an applicant who truthfully admits that he is an epileptic should be in a worse position than one who untruthfully declares that he is not. If a licensing authority was satisfied " on other information " that the applicant was an epileptic, it would surely be no less its duty to refuse the licence because the application denied that fact. It is true that this involves reading in the words " or otherwise " after "from the declaration," but, it is submitted, this is the sensible way of construing the Act.

If this is correct then it follows from *Hepworth's* case that a person who is in fact an epileptic (whether he admits it or not) cannot be "a person . . . aggrieved by the refusal of a licensing authority to grant a licence" under section 5 (5) and, consequently, that he has no right of appeal.]

Books and Periodicals

Book Reviews:

Kenny's Outlines of Criminal Law. Seventeenth edition by J. W. Cecil Turner. Cambridge: The University Press. 1958. 612 and (index) 17 pp. (60s. net.)

Twice rewritten since the author's death, as the dust cover reminds us, Kenny's *Outlines* is now settled in its new ways. Some old passages have been redrafted and some new ones written, in consequence of changes in the law; and the original chapter on the Nature of a Crime" (16th ed., App. I) has been jettisoned for lack of space. But the book remains the familiar graft of Turner upon Kenny which has made the learned editor's critical personality, for modern readers, one of its essential features. The student should regard Mr. Turner's characteristic contributions as valuable not only for his interesting arguments, but also for the example of his wonderful technique—the force and clarity of his exposition, the style bright with conviction. In this edition, developments in the law of homicide and of embezzlement provide the main occasions for Mr. Turner to move us to that curious feeling of combined admiration and dissent which (in one of his readers at least) it is his peculiar genius to produce.

Although Kenny is a book which all students should know, it may be questioned whether it is now a *first* book on criminal law. It is a tenable view that the function of a prescribed undergraduate textbook is to introduce received ideas and, so far as the state of the authorities permits, established principles. These may by all means be submitted to a measure of healthy stimulating criticism. But it should always be clear to the reader whether what he is offered is exposition, conjecture or heresy. The student using this book needs guidance in distinguishing between these elements. Three examples of the danger attending the unprotected novice must suffice: (1) A footnote has been amended to read (p. 53): "As to the killing of a supposed dead man by one who imagines himself to have *already* murdered him, see two Indian cases where it was held not to be murder; 36 L.Q.R. 6–8. And see the criticism of *Meli* v. *R.* [1954] 1 W.L.R. 228, in Russell at p. 60." In *Meli* the Judicial Committee had no difficulty in deciding that it *was* murder (common-sense surely concurs): should not the student be told so? (See also, perhaps more misleading, p. 28 at n. 2.) (2) Mr. Turner continues to assert that larceny and fraudulent conversion do not overlap, without revealing that the Court of Criminal Appeal disagrees: see *Williams* [1953] 1 Q.B. 660; *Davenport* [1954] 1 W.L.R. 569—authorities more persuasive than the argument of counsel cited at p. 316, n. 1. (3) *Miskell* [1954] 1 W.L.R. 438 is quoted (p. 93) as a case in which Mr. Turner's famous test for the *actus reus* in attempt was "adopted." By way of verification, phrases in which the Courts-Martial Appeals Court described M.'s conduct as having "manifested his purpose" are seized upon and quoted out of context. M. was convicted of an attempt to procure the commission of an act of gross indecency. The court was concerned to decide whether his conduct was such as to make clear to the *object of his overtures* what it was that he was asking; not with whether his acts gave "clear *prima facie* evidence of the *mens rea*" (p. 92) (although this would incidentally follow). The old tests are used and there is no hint of the adoption of any such test as that advocated by Mr. Turner.

It seems more important to mention such matters than to announce, as can be done with any book, a list of minor errors and omissions. Of these one may select, as being of some importance, the continued citation (at p. 48) of *Barker* v. *Levinson* [1951] 1 K.B. 342 by the All E.R. and T.L.R. references, with the unfortunate result of preserving the "general scope of employment" test of vicarious liability from which Lord Goddard C.J. tacitly recanted in the Law Reports version (see *Navarro* v. *Moregrand, Ltd.* [1951] 2 T.L.R. 674, 681); the failure to notice the Licensing Act, 1953 (pp. 41 and 48) and the Criminal Justice Administration Act, 1956 (worthy of mention at p. 518); the alarming omission of a negative at p. 80, n. 1; inadequate treatment of the interesting case of *Bourne* (1952) 36 Cr.App.R. 125; the absence of any reference to Dr. Edwards' *Mens Rea in Statutory Offences*; and the fact that the reader is sent a-hunting less often than he should be in the well-stocked preserves of Dr. Glanville Williams' *The Criminal Law, The General Part*. Such trivia do not seriously affect the quality of this edition, in which remarkably little of what has happened since 1952 has escaped attention. The work of revision has been most carefully done. So has the work of publisher and printer, retaining the acceptable type and format of the previous edition.

EDWARD GRIEW.

The Common Calendar. By Sir Fred Eills Pritchard, M.B.E., LL.D. London: Butterworth & Co. (Publishers Ltd. 1958. xvii and 257 pp. (32s. 6d. net.)

It has been said that the test of a well-pruned apple tree is that you are able to throw your hat through it. The test of efficient pruning of a legal textbook might be that the user for whom it is written can, with the help of a good index, find any required point without having to wade through a mass of unnecessary information. The author has with considerable success set himself the task of condensing into 169 pp., with the addition of an appendix of statutes, etc., the law likely to be required at quarter sessions and assizes. It verges on the insubordinate to criticise the work of an author of such learning and experience as Sir Fred Pritchard, but, on p. 55, is not the effect of *R.* v. *Cox* [1898] 1 Q.B. 179 on proof of age an essential? On p. 83, *Davies* v. *D. P. P.* [1954] A.C. 378 might be quoted in place of *R.* v. *Barnes and Richards* as being of greater authority and as definitely defining "accomplice": at p. 91 might not the effect of *R.* v. *Higgins* [1952] 1 K.B. 7, on the appropriate sentence for conspiracy have been stated?

Important omissions from a book of this type seem to be that at pp. 109 and 110 there is no instruction on the procedure in dealing with breach of probation as laid down in *R.* v. *Devine* [1956] 1 W.L.R. 236 and the effect thereon of *R.* v. *Perfect* [1957] 2 Q.B. 904, nor has space been found to deal with the very important discretion of the judge to curb the use by the prosecution of evidence strictly admissible but of prejudicial value only: see, for example, *Noor Mohamed* v. *R.* [1949] A.C. 182.

Most practitioners have at times been exasperated when searching in a hurry for some point in Archbold or Stone by the mass of detail contained therein, but the present volume is unlikely to replace the weightier works in red, or even blue, bags; on the other hand, its clear and at times discursive style are likely to be most useful and interesting to the lay justices who give so much care and attention to their duties. A chairman of quarter sessions will not go far wrong who adheres strictly to the instruction given here and may safely leave it to counsel to argue, and produce authority for, any proposition not dealt with in this authoritative statement of the criminal law.

C. B. O.

Casebook of the Curious and True. By Francis X. Busch. London: Arco Publications. 1958. 228 pp. (30s. net.)

It is a strange miscellany that Mr. Busch has collected together and it is difficult at first to see what connecting link the stories have, if any. It can only be that they are all true as the author claims, although this rather strains credulity. As the philosopher said, it must all depend on what you mean by truth, but his stories do clearly illustrate the difficulties of the American police system with its varying efficiency and frequently conflicting jurisdictions.

Nevertheless, Mr. Busch is a wonderful raconteur and one can well credit the claim in the publisher's blurb that he is in constant demand as an after-dinner speaker. His stories range from conveyancing through divorce to murder, and a really mixed bag they are too.

Probably his most interesting story is that of the great train robbery, which took place as recently as 1924. The scene was naturally in the vicinity of Chicago and the loot was in the region of two million dollars. This fascinating story has a delightful twist with the American courts deciding that the bribe offered to the police officers investigating the case was not part of the proceeds of the robbery and that in default of a better claim, it should be returned to the four detectives to whom it was originally offered. One can only consider that decision an excellent encouragement to the highest standards of honesty in the Chicago force, but unfortunately the period which followed hardly bore that out.

Although the reader from North of the Border should be warned of a reference to a " Scotch " verdict—and that not of the type one might expect of an American—this book should interest many readers on this side of the Atlantic and particularly the man whose work is also his hobby. It should also be read to find that without the blessing of the National Health Service, there can be such a thing as a bankrupt doctor.

HUGH DUDLEY.

Books Received:

Lord Goddard: His Career and Cases. By E. Grimshaw and G. Jones. London: Allan Wingate. 1958. 175 pp. (16s. net.)

Justice Triumphant. By Cecil Fielding. London: John Long. 1958. 162 and (index) 3 pp. (16s. net.)

The Problem Family. 4 lectures. London: Institute for the Study and Treatment of Delinquency. 1958. 40 pp. (3s. net.)

British Journal of Delinquency: *Homosexuality.* London: I.S.T.D. 1958.

The Child as Victim of a Sexual Offence. By David Reiffen. Reprinted from *The British Journal of Psychiatric Social Work.* 8 pp. (9d. net.)

Brief to Counsel. By Henry Cecil. London: Michael Joseph. 1958. 185 and (index) 4 pp. (12s. 6d.)

Keep Them Out of Prison. By R. A. F. Cooks. London: Jarrolds. 1958. 191 pp. (16s.)

Readers' Digest:

Disorderly houses: Bawdy houses, gaming houses and betting houses: 102 *Solicitors' Journal* 481.

Evidence: Corroboration of evidence in Scottish criminal law: 1958 *Scots Law Times* 137.

Food and drugs: Sale of food not of the nature, substance or quality demanded: 122 *Justice of the Peace* 461.

Gaming: Betting, gaming and lotteries: 66 *Police Review* 516.

Magistrates' court: The court and the psychiatrist: 14 *The Magistrate* 63.

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Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

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Editorial

The Lord Chief Justice

Since our last issue went to press Lord Goddard has retired from his office of Lord Chief Justice. We wish him a very happy retirement and extend a warm welcome to Lord Justice Parker in his difficult task of succeeding Lord Goddard in office.

There is little we can add to the many tributes which have been paid to the way in which Lord Goddard has graced the office which he has held since 1946. No one who has been in any way concerned with the administration of law—and justice—can be anything but grateful for the work which Lord Goddard has done and for the high repute which his tenure of office has brought the courts. Those of us whose concern is with the criminal law know that there is no aspect of the subject which has not, at one time or another, come under Lord Goddard's eye: policemen and lay magistrates as well as those reputedly " learned in the law " have received guidance from him, not only in the courts but in the many addresses which he has made to professional associations from time to time. In the courts Lord Goddard's administration of the law has been minutely scrupulous: however unpleasant the duty has appeared to him, if the law did not provide punishment for the act called into question, however immoral it may have appeared, the defendant went free, the duty of administering the *law* was discharged.

Outside the courts Lord Goddard frequently expressed his dissatisfaction with one or another aspect of the law. " The law of larceny is a public scandal " is one cry of his which has been echoed throughout the legal world. On the question of punishment he was firm: its object was deterrence; in an era when crime is on the increase his impatience with "sentimental socialists" was understandable, his sincerity unmistakable; and to call him a "reactionary" is blatantly unfair. As we recently pointed out, the Criminal Justice Act, 1948, owed much to his work on it in the House of Lords, while his campaign for the retention of capital punishment and his dissatisfaction with the Homicide Act, 1957, cannot be said to be views held by a reactionary minority.

In the criminal courts, much of his reputation for administering justice was due to the recognition of his great capacity for understanding human nature: his judgment of character, his ability to know when leniency would be repaid, compelled admiration in all who saw him at work.

As we have said, the task of following Lord Goddard in office is a difficult one. Lord Justice Parker is ably fitted to take on that task. His reputation as a lawyer is outstanding and, in view of the heavy judicial duties attached to this office, the appointment of someone who already commands great respect as a judge is a welcome one. To the general public, Lord Justice Parker's name has only recently become known in the inquiry into the alleged Bank Rate "leak." His conduct of that inquiry, with its many ramifications and difficult political background, must inspire confidence in his ability to discharge his duties as the head of the judiciary with the fearlessness which Lord Goddard has led us to expect of the Lord Chief Justice.

Increasing crime and the police

The Report of the Commissioner of Police of the Metropolis [1] for 1957 has shown that, once again, there has been a marked rise in serious crime: the number of indictable offences showed an increase of 15.8 per cent. on the previous year. The increase was most marked in offences such as housebreaking, shopbreaking and larceny from vehicles and also in the number of cases of wounding and assault. Once again the number of arrests of persons under twenty-one, and particularly of persons aged between seventeen and twenty years, showed an overall increase, the figures in the latter group exceeding the previously highest figures, *i.e.*, those for 1938. The percentage of crimes cleared up was 30.3, a figure slightly lower than that of 1956.

The Report of the Commissioners of Prisons [2] for the same year echoes the position revealed, not only by Sir John Nott-Bower's report, but by reports from Chief Constables throughout the country. The daily average prison population in 1957 was 22,368, and in the first four months of 1958 it rose to over 24,700, the highest figure yet recorded. The overcrowding of men's prisons which was considered in the report for the previous year continued and was, in fact, made worse by the increase in the Borstal population, as a result of which one prison has been changed to a Borstal, a second prison which, for a short time, had been an open prison, has become a Borstal, and two more prisons are about to follow suit. There was a slight increase in the number of prison officers, but this was only sufficient to cope with the higher prison and Borstal populations; it was not sufficient to enable any improvements in working conditions to be made; prison staffs are still working considerable overtime.

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[1] Cmnd. 487.

[2] Cmnd. 496.

Against this background of increasing crime we read the observations of the Home Secretary on the report of the Select Committee on Estimates on Police in England and Wales [3] to find that the Committee have expressed concern at the growth in the establishments of police. The Committee suggest that, in view of technical advances, the introduction of mechanical aids, and the employment of civilians to do work previously done by the police, new arrangements are needed for reviewing establishments. Mr. Butler, in answering this suggestion, draws attention to the fact that, besides factors such as increasing population, increasing crime, increasing road traffic, and the shorter working week, all of which were considered by the Committee in making their recommendations, the increase in annual and Bank Holiday leave is equivalent to the reduction in some thousands in strength, while there has been a substantial increase in the area of the country which requires intensive policing. This last factor is the result of the substantial growth in the suburbs of large towns, the establishment of new towns and large housing estates, and the increase in the number of industrial establishments, which need special policing. The question of devising a new system of reviewing establishments has been considered, but the factors involved are often of local origin; Mr. Butler does not feel entitled to press for a national yardstick and adds that "in any event, it should not be assumed that the imposition of a national standard of policing would necessarily result in economy."

Another suggestion made by the Committee is that a substantial reduction in the number of police forces is called for "on purely financial grounds." The Home Secretary's reply to this is that it was never envisaged that compulsory amalgamations were likely to produce substantial financial savings, and that his powers to make such amalgamations against the wishes of the police authorities are restricted, and that experience suggests that it would at best be only in an exceptional case that he would be able to show at a public inquiry that there were strong financial grounds for an amalgamation.

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[3] House of Commons Paper 264.

With respect to the Select Committee on Estimates, and bearing in mind that their principal concern is with finance, we consider that their recommendations are unrealistic and unhelpful, and in some cases (for example, in saying that premature retirements are ten times the pre-war rate) based on error. There is hardly a police force in the country whose establishment is fully manned: the deficiency for the Metropolitan Police is more than 3,000 men. Many of the suggestions made by the Select Committee seem to cover ground which is already being covered by the Home Office—for example, the problems of recruitment, wastage, training schemes—and to urge consideration of these problems for purely economic reasons is not to make the task of those responsible for finding solutions to them any easier. Nor is it helpful to suggest "penny-pinching" in welfare matters such as housing schemes, rent allowances and canteen facilities; the policeman's lot, particularly in these days of increasing violence, is not a happy one, and stringent economy in administering the police force is not going to assist recruitment.

The question of the policeman's lot has also been considered by the West London Stipendiary Magistrate, Mr. E. R. Guest, who has suggested that persons assaulting the police should be charged with causing grievous bodily harm, an offence carrying a maximum sentence of life imprisonment, rather than with assaulting a constable in the execution of his duty, the maximum penalty for which is a £20 fine or six months' imprisonment. Whether juries would feel disposed to convict on the graver charge is, as the *Solicitors' Journal* points out, a different question. If they did, there would be little doubt of the deterrent value of heavier sentences in these cases.

Suspect documents

One of the most frequent contributors to this *Review* since its inception has been Dr. Wilson Harrison, Director of the Home Office Forensic Science Laboratory at Cardiff. Dr. Harrison has now brought together his experience of work on suspect documents in nearly 7,000 cases in the past twenty-one years in a book which has just been published.[4] He has paid particular attention to three matters which, in the course of his official duties, he has had special opportunities to investigate: disguised handwriting, the forgery of the signatures of near-illiterate persons, and anonymous letters. Besides these special topics Dr. Harrison considers every aspect of investigation into documents suspected to be false: writing materials, typewriters, types of handwriting, and the problem of dating documents; he also deals with the equipment necessary to carry out the work. In his closing chapter Dr. Harrison considers the presentation of a case in court, which will be of outstanding value to all, lawyers and police alike, who find themselves involved in a case of this type. The book is amply illustrated with photographs and diagrams throughout the text, and should prove an indispensable aid to police work, as well as being of great interest to those who have no direct concern with the problems considered but whose appetite for information on the work of the forensic scientist has been whetted by Dr. Harrison's frequent contributions to this *Review*.

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[4] *Suspect Documents* by Wilson R. Harrison, M.SC., PH.D. London: Sweet & Maxwell, Ltd. 1958. £4 4s.

Magisterial chaos

"The affairs of this court are quite chaotic, and I do not know in the least how we are going to get through the business." These were the words of the Chief Metropolitan Magistrate, Sir Laurence Dunne, when he spoke of the number of remanded cases which have been accumulating at Bow Street Magistrates' Court during the past few weeks.

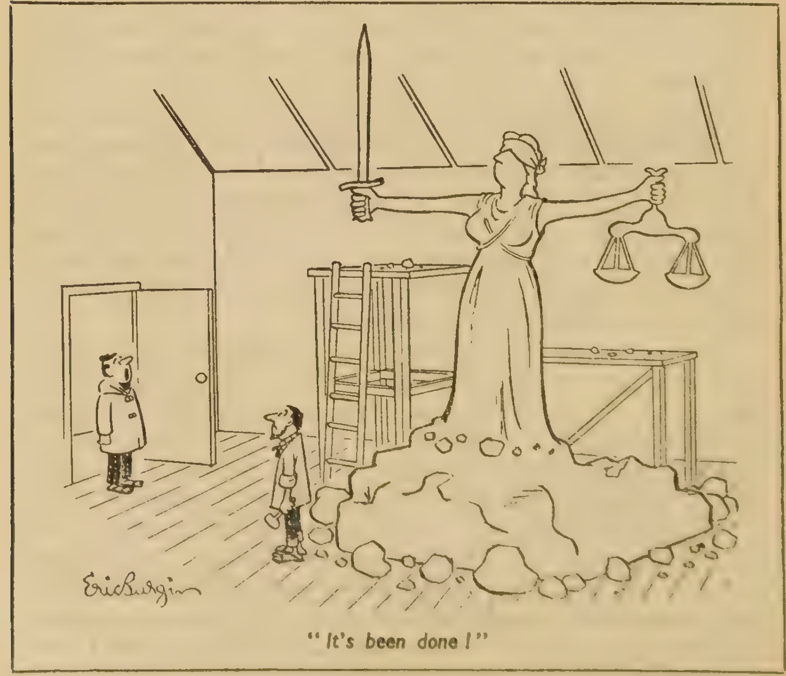
This chaotic state of affairs is not confined to Bow Street: the magistrates' courts are grossly understaffed and the magistrates are, as a result, greatly overworked; so much so that Sir Carleton Allen, in his article at p. 647, *post*, on the Tucker Report, suggests that magistrates have quite enough to do in exercising their summary jurisdiction and that they should, therefore, be relieved of what he considers the tedious and superfluous duty of conducting the preliminary proceedings to trial on indictment.

The real problem is encountered in finding time to hear those cases which, for one reason or another, are likely to require more than a day of the court's time. We, in this country, have long boasted of the speed with which the question of a man's guilt or innocence is resolved by the courts; of late, however, while much thought and energy has gone into reducing still further the delays in the superior courts, the piling up of cases on remand in the magistrates' courts has gone on almost unnoticed, and accused persons have been kept waiting weeks, and even months, before their cases could be given full hearings. Sir Laurence Dunne's statement (perhaps *cri de coeur* is more accurate), quoted above.

was made on September 11, when he remanded two men on bail until October 2, and a third in custody for a week, saying that he thought it unlikely that the hearing of their case would begin before October 13, and that it might even be necessary for it to be heard in a different court.

The constant appearances made by persons on remand, and particularly those remanded in custody, whose position must be reviewed weekly, leads to a very considerable waste of the time of the court (not to mention the time of counsel and solicitors), with the result that the "traffic jam" of cases on remand gets steadily worse.

Suggested solutions to the problem, such as allowing magistrates to withdraw from the ordinary day-to-day work of the court in order to deal quickly with the more difficult cases, depend, ultimately, on the provision of more magistrates to do the work, and more courts in which to do it. Bow Street has three courts and four stipendiary magistrates, but these are obviously not enough when the hearing of a case involving three accused charged with a conspiracy involving some £100,000 cannot begin for at least a month.



"It's been done!"

The Report of The Departmental Committee on Proceedings Before Examining Justices

By Sir Carleton Allen, Q.C., D.C.L., J.P.

After all the heroics (which are still re-echoing) about " secret justice," " Star Chamber " and " muzzling the press," the Report of the Departmental Committee on Proceedings before Examining Justices [1] (the Tucker Committee, for short) comes as a refreshing antidote. Considering the amount of evidence which was submitted, its 25 pages are a notable achievement of conciseness. The witnesses orally examined numbered only 41, as against 88 written memoranda submitted by a large variety of associations and individuals. At this date of writing the Minutes of Evidence are not yet published. They will doubtless be bulky and probably expensive, but, when available, they should prove to be a storehouse of commentary on our whole jury-system and criminal procedure.

The Report (para. 4.) begins with a statement which is highly relevant to the whole of this vexed question—*viz.*, that " many people do not understand the true nature of proceedings before examining justices." One has only to hear casual conversations among people of all degrees of intelligence, during the preliminary publicity of any " sensational " case, to realise how widespread is this misunderstanding. " I saw it in the paper " is quite enough evidence for many members of the great public.

The recommendations of the Committee really reduce themselves to two:

(1) Examining justices should not sit *in camera* except on such occasions and for such purposes as are (to be) prescribed by statute; and (2) reports of committal proceedings should contain only the identity of the court and the names of the examining justices, the particulars of the accused, the prosecutor, witnesses, counsel and solicitors, and the offence or offences charged; also the date of any adjournment, and the decision to commit to a named court on a specified charge or charges; but if the accused is not committed then full publication should be allowed, and it should also be permissible *after the conclusion of the trial on indictment* to publish reports of the antecedent committal proceedings.

With regard to these particulars, we would observe in passing: (1) that it hardly seems necessary, and it is not at present the common practice, to publish the names of the committing justice or justices, though on the other hand there does not seem to be any harm in it; and (2) as the Report recognises (para. 62) it will be only in very rare circumstances that a newspaper will wish to publish an account of the preliminary proceedings after the conclusion of the actual trial. We have reason to believe that some editors, always harassed by considerations of space, already do not greatly welcome the necessity of reporting criminal proceedings twice over.

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[1] 1958, Cmnd. 479.

"Reports" are not confined to newspapers, but may be publicly communicated by any medium (para. 66). This is a salutary provision. It is not long since a person who had been questioned by the police, and who was freely stated to be the principal suspect in a peculiarly revolting case of murder, was interviewed on television —a sinister symptom, we believe, of that exploitation of "sensation" which plays a large and specious part in a certain type of rhetoric about "freedom of the press."

A breach of these provisions is to be an offence, but no prosecution is to be undertaken except with the sanction of the Attorney-General. On the other hand, reports, as thus regulated and restricted, are to be entitled to the protection of the Law of Libel Amendment Act, 1888, if contemporaneous, fair and accurate.

Influence on the jury

The main reason which moved the Committee to its conclusions, after careful weighing of the *pros* and *cons* of the present system, is summarised at the end of the Report (para. 71): "It is in our opinion illogical and wrong to permit such latitude in the reporting of preliminary proceedings that confidence in the fairness of the trial is undermined." If that is the effect of the present system, then it needs "some overriding merit" to justify it; and the Committee can find no such merit.

The champions of the *status quo* reply that this is merely yielding to a vague and unconfirmed impression about public opinion, or a section of it, and that there is "no proof" that juries are influenced by what they have read or heard. Of course there is no proof, nor can there be, of what takes place in a jury-room or of what goes on in the minds of jurors. There is ample proof, however, in the experience of every one of us, of the suggestibility of human nature. The Report (para. 34 (b)) states the position well and moderately. After referring to our numerous "antiseptics" against extraneous influences on the minds of the jury, it continues:

> "No one disputes the need for these precautions and clearly they are justified. Juries do not analyse evidence

> scientifically. What they have to do, and are often in terms encouraged to do, is to look at the case as a whole and use their common sense in establishing what are the facts. No doubt they conscientiously try to exclude from their minds any previously acquired knowledge or preconceived ideas about the case, but the safeguards which already exist recognise that there is a danger that any information which they possess in addition to the sworn evidence may, perhaps unconsciously, influence their judgment of the weight to be attached to the sworn evidence. To exclude knowledge from the mind in reaching a decision is a difficult task which juries ought as far as possible to be spared."

We have never been able to understand how the friends of the present system reconcile the antinomy between the unquestioned and unquestionable " antiseptics " and the unrestrained infection of preliminary publicity. The paradox becomes almost a *reductio ad absurdum* in at least two instances. Evidence of a highly damaging nature—say, of " system," as in the *Adams* case [2]—may be given at the committal proceedings, and fully reported; yet when its admissibility comes to be questioned at the trial, the jury is solemnly sent out of court during argument, lest its mind be contaminated by improper knowledge! Again, save when the accused has put his character in issue or attacked the Crown witnesses, any reference to his previous convictions is fatal to the prosecution; yet, as the Report points out (para. 34 (c) (i)), with a reference to the well-known cases of *Dyson,*[3] and *Armstrong,*[4] the jury may know all about them through a report of an application for bail at the committal proceedings. Such contradictions border on farce. They are the less justifiable when it is realised that they are quite a modern development, which has crept into our law through historical accidents and misunderstandings. This will be apparent from the Report's prefatory historical sketch of committal proceedings. It is necessarily brief and succinct, and if the Committee had not very rightly aimed at conciseness, a great deal more might have been said about the past confusion, both popular and judicial, which has arisen in this aspect of procedure.

If there is " no proof " of prejudice on the part of juries, there have been some strange cases in our criminal records. It is difficult, except on grounds of prepossession, to account for the conviction for cold-blooded murder of William Herbert Wallace in

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[2] *R.* v. *John Bodkin Adams.* See [1957] Crim.L.R. 365.

[3] (1943) 29 Cr.App.R. 104.

[4] (1951) 35 Cr.App.R. 72.

Liverpool in 1931, which the Court of Criminal Appeal had no hesitation in quashing. Would Mrs. Maybrick have been convicted if she had not been tried by a local jury? Nobody can tell; but it has always been one of the mysteries in the annals of advocacy why her counsel, Sir Charles Russell, did not apply for a change of venue.

The Report emphasises the one-sidedness of committal reports, when all that is before the court, in the vast majority of instances, is the case for the prosecution. There is another unfortunate aspect of newspaper reports which the Committee does not mention. They must be " fair and accurate " to enjoy privilege; but how can they be really " fair and accurate " when they are severely truncated? When a hearing goes on for days or even weeks, no newspaper can possibly present anything but a highly condensed version, which depends on the extremely variable skill and selectivity of the reporter—and not only on him, but on his sub-editor, the man with the blue pencil ever haunted by the exigencies of " space." A great many reports of cases, while keeping on the right side of the law, are in reality unfair, and sometimes even unintelligible, not for what they put in but for what they leave out.

" New evidence "

The Report (paras. 45–49 and 70 (c)) disposes of the overworked contention that publicity brings forward material witnesses who might otherwise not be available to defence or prosecution. The Committee is convinced that this happens only in a " minute number " of cases, quite insufficient to outweigh the disadvantages of preliminary publicity. This accords with opinions which the present writer has obtained from very experienced counsel and from senior police officers. What the Report does not mention is that when any case is " good copy " and widely publicised, the police and the defence are often overwhelmed with a flood of offers of " new evidence," most of it quite worthless and not a little of it definitely crazy. Grains among all this chaff are, we are reliably informed, exceedingly rare. Again, it seems inequitable that while the limelit accused should enjoy this alleged advantage through the publicity of the national press, the ordinary man in the dock, who generally receives only scant preliminary publicity in the local press, should be denied it.

Hearings in camera

There will doubtless be mixed feelings and opinions about the recommendation that hearings *in camera* should be governed by statute. For ourselves, we welcome this provision. The discretion now vested in the justices by section 4 of the Magistrates' Courts Act, 1952, is delicate and difficult and, with respect, we feel that the mild admonition administered to the Eastbourne magistrates by Devlin J. in the Adams case was scarcely deserved. Doubtless Eastbourne was buzzing with rumours of all kinds, and the magistrates were in a difficult position, the more so because the question which they had to decide, the admissibility of evidence of " system," is one of the most debatable in the whole law of evidence. The truth is that every locality has its own peculiar currents and cross-currents of prejudice and suspicion and sensitiveness—social, political, sectarian, or personal. Magistrates cannot ignore these local elements, and thereby create an impression of " hush-hush," when they are constantly told that justice must be " manifestly seen to be done." In seventeen years of experience of committal proceedings, the present writer has never known a single case in which a hearing *in camera* was so obviously desirable that a bench of two or three examining justices would have been unanimous on the point. In the memorandum submitted by the Magistrates' Association it was suggested that the High Court might give justices guidance about the exercise of their discretion; but it is difficult to see how learned judges could do more than repeat their familiar principle that discretion must be exercised " judicially," and this seems to have been the opinion of the Lord Chief Justice (para. 57). In any case, we wonder—in hushed tones and with the utmost respect—whether High Court Judges, few of whom have ever sat in petty sessions, are the best persons to understand, from their higher altitudes, the local problems of the Great Unpaid.

All this, however, becomes somewhat academic if the main recommendation of the Report is adopted, since, if only the precribed particulars are to be reported, hearings *in camera* will obviously become unnecessary; and the alleged danger that some casual member of the public who is present in court will broadcast what he has heard is negligible (para. 61), and in any case he will gossip at his peril. The statutory occasions for private hearings are likely to be extremely rare; the Report (para. 69) suggests that they may occur when national security is in question, or when a witness is put in fear, or when evidence has to be taken elsewhere than in court (as in the case of illness). Closing the court would not seem to be necessary when children are concerned in sexual cases, since that is sufficiently safeguarded by the statutory prohibition of the publication of indecent matter (Judicial Proceedings (Regulation of Reports) Act, 1926), and by the power of the court to order that the names of child witnesses be not published.

Press reaction

The reception of the Report by the press is what might have been expected. *The Times,* for once, permitted itself a shrill note unusual in that sedate journal. A much more balanced and temperate article appeared in *The Daily Telegraph.* The journalist witnesses before the Committee were practically unanimous in opposing any change. This attitude of the press springs, we believe, from two distinct motives. There are the honest and conscientious journalists, with a sound professional ethic—they are, we believe, the large majority, especially in the provinces—who are sincerely jealous of their freedom and feel it their duty to resist anything which they believe threatens an essentially democratic principle. There are many others who are completely hypocritical in this matter and to whom the " freedom of the press " means merely freedom to exploit the mass-mind by any cynical means which seem profitable. Together, these unnatural allies make a formidable combination, but in one recent instance at least their passion seems to have been misspent. The Summary Jurisdiction (Northern Ireland) Act, 1953, was violently denounced by a concerted press campaign, but the Tucker Committee is now able to report (para. 53) that the restrictions imposed by that Act are working quite smoothly and that the jeremiads of the opponents have proved illusory. On the other hand, the Committee gives good reasons (para. 55) for its conclusion that the Northern Ireland solution, which leaves a large discretion to the justices to order private hearings, would not be equally appropriate or workable in England and Wales, with their larger population and far greater number of magistrates' courts.

Beyond this immediate question lies a larger one, which is raised by Mr. Ashe Lincoln, Q.C., in a letter to *The Times* on August 2, 1958. Is not the whole of our present system of magisterial examination excessively cumbrous and otiose? It is really a legacy of the past, before the establishment of a professional police force, a C.I.D. and a Director of Public Prosecutions, and it compares very unfavourably with the Scottish system, in which the responsibility for prosecution lies with the Lord Advocate and his deputies. The truth is that magistrates feel, in the great majority of cases, that they are being used merely as a piece of machinery for the convenience of the court of trial, at heavy expense of their time and usefulness. For example, the deplorably common offence of housebreaking is still not triable summarily, and magistrates have to spend many hours in these cases taking depositions which are little more than a formality. The prosecution has already taken the proofs of the witnesses, who are thus under the necessity of telling their stories three times—a most time-wasting process, and sometimes highly undesirable, especially in sexual cases. This iteration is also an unfair tax on the memory of witnesses when the *res gestae* are not very recent, and it brings upon them disproportionate discredit in the eyes of a jury when, as so often happens, cross-examination reveals discrepancies, even minor ones, between their different statements. The police seldom institute a prosecution unless there is at least a *prima facie* case, and the number of discharges by examining magistrates (the commonest reason for which is that the prosecution witnesses do not come up to their proofs) is estimated by the Committee (para. 7) at 3 per cent. or 4 per cent. of the total number of charges; from personal experience, the present writer would have supposed it to be even less. Taking written depositions, word by word and sentence by sentence (sometimes through an interpreter), is a lengthy process even in the most straightforward cases; magistrates, at least in populous centres, are quite sufficiently occupied nowadays with their summary jurisdiction, and it seems to be high time that the whole system was overhauled and justices and their clerical staffs relieved of a tedious and superfluous duty. Nor does there appear to be any convincing reason why the court of trial should be supplied with the outline of the case, which, in any event, is usually only that of the prosecution. Under the Scottish system the precognitions are not revealed to the court of trial and the case is presented *ab ovo,* which seems the proper approach to a criminal cause. It is said that the great advantage of the present system is that the accused knows exactly the case which he has to meet; but that safeguard can easily be secured by other means than public examination, as it is under the Scots system of private precognitions.

It remains to be seen whether the Government will introduce legislation on the lines recommended by the Committee, and if so, whether under the whip or on a free vote. We can be sure of a lively battle, in any event. The press is strongly represented in both Houses, and doubtless we shall hear all the old slogans sounding and resounding, to the loud acclaim of nearly every newspaper in the country. There are two adjacent parts of Fleet Street of very different characters—one near the Temple, presided over by a blindfolded goddess, and one, further east, where a rich and gaudy temple serves other gods. It will be interesting to see which of these twain prevails.

The Trial of Peter Manuel

By a Scots Advocate

The trial of Peter Thomas Anthony Manuel was one of the most remarkable in the annals of Scottish criminal history. The trial was sensational from the very start; in answer to an indictment of no less than eight murders, a special defence was tabled which included the impeachment of another person as being responsible for three of the murders. During the course of the trial, there followed evidence of an extraordinary confession, allegations of a criminal conspiracy among senior police officials, and the summary dismissal of all three defence counsel halfway through the trial. At the hearing of the appeal, Manuel was again represented by counsel, but did not attend the appeal himself, contrary to the usual practice.

The trial was heard before Lord Cameron and a jury in the High Court of Justiciary sitting on circuit at Glasgow on May 12, 1958, and lasted sixteen days. The Crown was represented by M. G. Gillies, Advocate Depute, and Mr. R. I. Sutherland, and the accused by H. R. Leslie, Q.C., W. R. Grieve, Q.C., and Mr. A. M. Morison.

The charges

The catalogue of crimes charged was so extensive that it will be convenient to summarise them here. The main charges all related to crimes committed in the county of Lanarkshire. These charges, together with the special defences where applicable, and the verdicts were as follows:

(1) A charge of robbery and capital murder of Anne Kneilands on January 2, 1956. On the direction of the judge, Manuel was found not guilty on this charge.

(2) A charge of house-breaking at Bothwell on September 15, 1956, and of stealing a razor and maliciously discharging a firearm into a mattress; there was a unanimous verdict of guilty on this charge. It was proved during the course of the trial that the bullet found in the mattress had been fired from the gun used two days later to kill the Watt family.

(3) A charge of capital murder of the wife and the daughter of William Watt, and also his sister-in-law, at his home in Burnside on September 17, 1956. A special defence was lodged that these murders had been committed by William Watt. Manuel was found guilty of capital murder on this charge.

(4) A charge of the robbery and capital murder of Isobel Cooke at Mount Vernon on December 28, 1957. The accused was found guilty of murder.

(5) A charge of the capital murder of Peter Smart and his wife and son at Uddingston on January 1, 1958. There was a special defence of alibi which stated that Manuel was at home at Uddingston during the hours between which the murders were alleged to have been committed. The verdict on this charge was capital murder.

The confessions

During the course of the police investigations, a number of written statements were given by Manuel to the police. In the first statement he offered to give the police information to clear up a number of unsolved crimes of homicide in Lanarkshire. He also requested to see his parents to " make a clean breast of it with them first." The second statement said that he would give information about certain specified crimes (which later were to feature in the indictment) and his part in them, " on condition that my father is released and allowed to see me with my mother." (Shortly before this statement had been made, Manuel's father had been taken into custody in connection with one of the house-breaking charges with which Manuel himself was subsequently charged. The stolen goods had been found in the Manuel home.) When the police saw the conditions attached to the statement, they told Manuel that they were in no position to give such an undertaking, since the matter had by then been referred to the Procurator Fiscal, in whose hands lay the decision as to whether any prosecution was to proceed. In the third and main confession Manuel admitted all eight murder charges, and gave circumstantial details about how they were committed.

The evidence

According to the law of Scotland, a confession is not by itself sufficient to fix the guilt of the accused, but it must be corroborated by some other evidence, however slight. In his summing-up, therefore, Lord Cameron, who had during the course of the trial allowed the confessions as admissible evidence, was at pains to review to the jury the evidence on each charge, paying particular attention to the question of whether it corroborated the accused's own statements.

The murder of Anne Kneilands

On the charge of murdering Anne Kneilands, Lord Cameron held that there was insufficient evidence on which to convict the accused, and so directed the jury. No weapon had been identified as being positively associated with the injuries on the girl's body, far less with Manuel. It was not proved that she had ever been seen at any time in Manuel's company, or that he had been in the vicinity on the night of the murder. The scratches observed on Manuel's face after the murder could have been caused innocently in a number of ways. There was thus no independent evidence to corroborate the accused's confession.

The murder of the Watt family

The significance of the house-breaking charge at Bothwell was that the bullet which was fired into the mattress was proved to have come from the 0.38 Webley revolver which was used to murder the Watt family. The razor which was stolen at the time the gun was fired was found later in Manuel's house. Manuel told Watt's solicitor, Lawrence Dowdall, in 1956, and later Watt himself, about this bullet, but the bullet was not discovered in the mattress until the end of 1957. How did Manuel know the bullet was there if he had not fired the gun himself at the time? The reason why Manuel had told Dowdall and Watt about the bullet was in order to exculpate Watt, who was at one time charged with the murder of his family. Watt could not possibly have fired the bullet into the mattress as he was proved to have been away on holiday at Lochgilphead at the time. Manuel had no reason to get in touch with Watt at all; putting his head in the noose, as Manuel did, was typical of his conceit and self-confidence.

Manuel, in fact, had several meetings with the solicitor Dowdall, the first of which was in October, 1956. Manuel told Dowdall what had happened in the Watt bungalow, but insisted that he had not been there. Dowdall gave evidence that Manuel had given him a full description of the murder weapon and the Watt house, and told him that one of the women in the bungalow had been shot twice, and that the Watt girl had been assaulted and tied up. These facts were not public knowledge at the time, and Manuel gave no explanation as to how he knew of these things.

Watt had at one time been charged with the murder of his family, and this would seem to have given some support to Manuel's plea that Watt had done the killings. Manuel's story at the trial was that Watt had confessed to him that he (Watt) had killed his family, and had thereafter given the Webley gun to a man called Tallis, who had already featured in the case in connection with the housebreaking charges. According to Manuel, Tallis, who was a friend of his, had then got rid of the gun—by placing it in the dining room drawer in Manuel's house, where it was subsequently found. Lord Cameron asked the jury whether they could imagine a more sinister story than this one about planting " the hottest gun in Glasgow " in a table in the accused's house where the police, following a tip-off from Tallis, could find it. Such an action, said the judge, could be " comparable with the kiss of Judas," if it were true.

Watt told the court that on the night his family was murdered he was on holiday at Lochgilphead. It could have been just possible for him to drive to Glasgow and back there, where he was seen the next morning at 7.30 a.m. Watt's story was supported by the fact that the windscreen of his Vauxhall car was frosted over, as though it had lain outside the hotel all night. On the other hand, two witnesses claimed to have identified Watt in his car that night, both on the road to Glasgow. Taylor, the Renfrew ferryman, said he saw Watt in a Wolseley on the ferry at 3.30 a.m. Morrison said he saw Watt in his car on the Loch Lomond road. The circumstances of these identifications were such as to raise doubts as to whether they were authentic. The judge cautioned the jury in this respect—a caution which was later to form the subject of one of the grounds of appeal. Manuel confessed to the murder of the Watt family. Lord Cameron told the jury that if they believed the evidence of the solicitor Dowdall, that was ample evidence of the corroboration.

The murder of Isobel Cooke

Manuel confessed to the murder of Isobel Cooke, and told the police that he would show them where he had buried the body. The girl's shoes, and later the body of the girl, were found in a field by a party made up of police officers and the accused at about 2.30 a.m. on January 16, 1958. The police evidence was that Manuel showed them where to dig for the body, and where to look for the shoes which he said he had thrown away. Manuel's evidence at the trial was that the whole search had been a frame-up, and that the police knew all along where the body was. The accused had also been seen in the vicinity on the night of the murder—" behaving in a somewhat furtive manner." The jury were told that if they believed that Manuel had actually led the police to the spot where the body was buried, then that was ample corroboration of his confession.

The murder of the Smart family

Manuel stated in his confession that he had shot the Smart family in their house at Uddingston (less than ten minutes' walk from his own house) in the early hours of January 1, 1958. The corroborative evidence in support of the confession was as follows: Manuel admitted being in possession of the murder weapon, a Beretta pistol, until at least the day before the murder. Two witnesses gave evidence of having sold the gun to Manuel a short time previously. Manuel admitted throwing the gun away in the Clyde where it was eventually found. He admitted having in his possession on January 1 a number of Commercial Bank notes proved to have been drawn from the bank on December 31 by the murdered man. This admission was also proved by other evidence. Manuel also admitted having been in the Smart house shortly after the murders had been carried out. The accused, however, pleaded a special defence of alibi, in that he was at home in bed when the crimes were alleged to have been committed, and his father gave evidence in support of this alibi.

At the trial Manuel gave an explanation of his behaviour which was characterised by Lord Cameron as being, " on the face of it, somewhat extraordinary." His story was that he had become friendly with Smart, and had procured a gun at his request. He sold Smart the gun on December 31, being paid in Commercial Bank notes. Smart, who was going away on holiday at the New Year, had then given Manuel the keys of his house so that Manuel could entertain a friend of Smart's there. Manuel said he was returning from a party at about 4 a.m. on January 2, when he passed near the Smart house. He thought he would nip in and have a drink, and when he entered the house he found all three members of the family dead. He removed the gun, because he thought that the fact that he had sold it to Smart might incriminate him. Manuel was unable to produce any evidence in support of this story, and he was found guilty of capital murder.

Manuel was also charged and found guilty of stealing a car from the garage of the Smart home at the same time. A policeman gave evidence that Manuel had given him a lift in the car on the day after the murder—a fact that once again demonstrated the brazen self-confidence of the accused.

The appeal [1]

Manuel's appeal was heard on June 24–25, 1958, before the High Court of Justiciary sitting as Court of Appeal in Edinburgh under the Criminal Appeal (Scotland) Act, the court consisting of the Lord Justice General (Lord Clyde), and Lords Carmont and Sorn. The Crown was led by the Lord Advocate, W. R. Milligan,

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[1] 1958 S.L.T.(Notes) 44.

Q.C. The appeal was conducted on behalf of the appellant by R. H. McDonald, Q.C., having been nominated for this task by the Dean of the Faculty. During the course of his trial, as will be discussed shortly, Manuel had revoked the mandate of his counsel, but a fresh appointment was made for the purposes of the appeal.

At the start of the appeal, counsel told the court that he had advised the appellant not to be present at the hearing, but that in his submission, the court was entitled to proceed without his presence. This non-appearance of the appellant was most unusual, and this initial " sensation " sent half-a-dozen reporters hurrying out of court at once to telephone expectant news editors.

Six grounds of appeal were led, five of which dealt with aspects of the separate charges. A success on any single ground could not necessarily have affected the conviction on the other capital charges, and would have been, in the words of Lord Sorn, merely " an academic victory." These five grounds were in turn dismissed. The major ground of appeal, that the alleged confessions, both written and verbal, should not have been admitted as evidence, covered the conviction on all the major charges, and it was this ground which was naturally to occupy most of the attention of the court.

The main confession was written out by Manuel himself in Hamilton police station between 4.15 and 6.15 a.m. on January 16, 1958, a few hours after he had led the police to discover the body of Isobel Cooke which he said he had buried in a field.

When a police officer at the trial began to give evidence regarding the confessions, objection was immediately taken by defence counsel on the ground that the statements were inadmissible. In accordance with the procedure laid down in *Chalmers* v. *H.M. Advocate*,[2] the jury left the court while the evidence of the confessions was led. The judge having determined that this evidence was admissible, the jury were then recalled and the evidence was led again in their presence.

The main ground of appeal was that the statements had been made in circumstances which were unfair to the accused. In particular, it was suggested that Manuel had been induced to make the confessions on the understanding that his father, who was being held on the housebreaking charge which Manuel himself was later to face, should be released. The evidence given at the trial regarding the circumstances in which the statements were made was read to the Appeal Court, but the appeal on this major ground was also dismissed.

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[2] 1954 J.C. 66.

The Lord Justice General, giving the opinion of the court, said that on this ground " the confession satisfied us that he was fully and rationally aware of what he was doing, and deliberately made up his own mind to unburden his soul of the dark deeds which he narrated in such convincing detail."

Legal aspects of the trial

From the legal point of view, the Manuel trial proved to be unique in a number of respects. First, the tabling of a special defence was an uncommon step. The purpose of a special defence is to give notice to the Crown that the defence will be something beyond a mere denial of the charges. A special defence normally takes one of four forms—alibi, impeachment, self-defence or insanity. In each case, the burden of proof is on the accused to prove his defence on the " balance of probability " standard. Manuel's case was unique in that *two* separate special defences were tabled—alibi (in the Smart murder charge) and impeachment (in the Watt murder charge). The last reported case [3] in which the special defence of impeachment was used was in 1859. The defence was actually withdrawn before trial in that case, and in any event, the charge was one of manslaughter, not murder.

Manuel's summary " dismissal " of his counsel halfway through the trial was also remarkable. It is significant to note the moment that he chose to take this step was immediately after the judge had ruled that the evidence of the confessions was admissible. Once the technical legal debate on that question had been concluded, Manuel probably felt that he would have greater freedom in proceeding on his own. He knew that he would obtain a certain amount of sympathy from the jury in his predicament—even although he had created it himself. He knew, too, that the judge would take the greatest care to safeguard his rights and interests to ensure a fair trial. Lord Cameron in fact allowed the accused to recall certain witnesses for further questioning.

Having dismissed his advocates, Manuel would have been entitled to instruct fresh counsel to represent him, but he declined to do so. When it was learned that Manuel intended to conduct his own defence, the Dean of the Faculty of Advocates, along with the Clerk of Faculty as his junior counsel, forthwith presented themselves to the court to offer their services freely to the accused. This was in accordance with the long-standing tradition of the Scottish Bar, whereby no one need go unrepresented on a major criminal charge merely because they have insufficient funds to instruct a proper defence. The judge thanked these counsel for their attendance and offer, which reflected the generous traditions of the Scottish Bar.

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[3] *H.M. Advocate* v. *Robertson*, 3 Irvine 328.

There is no doubt that in its popularly "sensational" aspects, the trial of Peter Manuel will rank as one of the most notable trials of the century. But the unique legal aspects of the case will also make it peculiarly memorable to lawyers for many years to come.

The Outlook for a Devil in the Colonies

A Colonial Viewpoint on Witchcraft, Homicide and the Supernatural

By Justin Lewis

If a person in the United Kingdom telephoned the police and reported that he had shot a human being who, at the time of the shooting, was a demon, grave doubt would be entertained as to the sanity of the person making the report, for belief in the supernatural in this country is generally believed to be a superstition. In most colonies in the Commonwealth, however, the indigenous peoples believe that devils, spirits and demons exist. Witch-doctors, obeah, voodoo, "pointing the bone," are persons or ceremonies which are an integral part of native custom and belief. Ingredients of potions and philtres, and the necessities for casting spells are on sale in most West African markets. Occult powers are believed in, bought and sold, and fail and succeed in gaining their ends. Words such as "lion-man," "obeah," "ju-ju" would mean nothing to an English jury but to colonial peoples they are all matters connected directly or indirectly with the practice of witchcraft. Although a "lion-man" is a human being he is often released after a series of occult ceremonies. Their existence has been judicially recognised in the case of *Muhandi* v. *R.* "A lion-man" was defined (on appeal) as "a human being who has been brought up as a beast to kill on the orders of those in charge of him and to kill with bestial ferocity. While employed in its inhuman task the creature disguises itself in the skin of a lion, or partly in lion skins and partly in baboon skins." The Court of Appeal for Eastern Africa said in the judgment in this case:

> "It is a common feature of these fantastic and disgusting cases that the lion-man who is the actual killer in every case, appears to be left under the control of a keeper who is sometimes a man and sometimes a woman, but who is invariably paid a sum of money before releasing the lion-man for the work in hand. . . . This court has come to the conclusion . . . that where there is evidence from which the inference is inescapable that a keeper released a lion-man for money received and handed him to another with the knowledge that the hirer intended that the lion-man should proceed to a spot and there kill a person, such keeper is the principal offender to the crime of murder." [1]

The fact that the background, life, and pattern of a colony may be so different that the application of English legal principles to such a society may have to be altered is a principle which has been recognised in many cases. *Macleod* v. *St. Aubyn* [2] is such a case, arising out of the publishing of an article and letter in the newspaper *The Federalist* in the West Indian Island of St. Vincent on April 2, 1897, attacking Mr. St. Aubyn, who was then acting as Chief Justice. One sentence of the article read as follows: "In Mr. Trafford the public had no confidence and his *locum tenens* Mr. St. Aubyn is reducing the judicial character to the level of a clown." A paragraph from the letter reads: "A man of the Torquemada type, narrow, bigoted, vain, vindictive and unscrupulous, he takes advantage of his position to vent his spleen upon those whom he hates, although unlike Torquemada, fortunately, he is unable to send them to the stake." Lord Morris, in his judgment in this case said: "Committal for contempt of court by scandalising the court itself has become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them, but it must be considered that in small colonies, consisting of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of, and respect for, the court." Here is an admission that a principle, obsolete in England, may be necessary in a different social background. That this should be so is correct, for the state of the law represents the social conscience of the community.

The difference between beliefs held in a colony and those held in the United Kingdom is demonstrated by a case occurring in the

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[1] [1957] Crim.L.R. 814.

[2] [1899] A.C. 549.

Colony of Fiji.[3] It is to be noted that these incidents and the resulting murder trial occurred in 1954. The following facts were proved thereat. The daughter of an Indian sugar cane farmer became ill. (Indians from India who originally came to the colony as indentured labourers now out-number the indigenous peoples of this colony, the Fijians.) He went and consulted a magician, who said that for payment he would remove the devil that was in the daughter into the head of his wife, the mother of the sick girl. The required payment was made, the daughter recovered, but the wife became ill, suffering from fits. The Indian went and consulted the magician again, who said that for payment he would remove the devil from the wife's head. After a ceremony lasting some time the magician left. Exclaiming that the woman was a devil, the husband threw a heavy lump of wood onto his wife's body and killed her. All the villagers who gave evidence for the prosecution swore they believed in devils and in a variety of them, including hobgoblins, wood demons, and even devils with spangles (Churchail).

If a number of English witnesses swore to similar facts one would suspect their sanity. The comment in Kenny [4] upon persons who have killed a human being believing that person to be a supernatural being is: "It would be more satisfactory if these instances of fantastic superstitious belief were classed as insane delusions, and treated in accordance with the rules applicable thereto." This may be true in regard to the United Kingdom but it is not true in regard to many of the dominions and colonies. In fact, in South Africa, it is quite incorrect. There, a native believed himself to be suffering from some internal ailment which he believed to have been caused by his being bewitched. He killed the alleged witch with a chopper. The court held, "not evidence of insanity to show that the accused believed in witchcraft and that he honestly believed that his victim had by means of witchcraft done him an injury." [5] Once more this case demonstrates that a principle, applicable to the United Kingdom, does not apply to the colonies.

What Kenny means in his statement quoted above is that those who kill a human being, believing that being to be a supernatural one, should be treated in accordance with the rules applicable to insanity. But are these beliefs "fantastic" and "superstitious"?

In 1944, a woman medium and some other persons were charged with offences under the Witchcraft Act, 1735, in that they falsely pretended to conjure up spirits.[6] Application was made by defending counsel to the Recorder of Portsmouth, who tried the case, that the accused should be given an opportunity to conjure up spirits in the courtroom. The application was refused. On appeal, the Court of Criminal Appeal held that the application to demonstrate the defendant's powers to the jury was rightly refused. The court mentioned in particular the practical difficulties involved but never denounced the claim to conjure up spirits as fantastic or being part of a superstitious belief. Today, although few persons believe completely in the existence of supernatural beings, a great many believe half-heartedly in ghosts. Given a dark night, a supposedly haunted house, an imaginative Celt with shotgun, and a drunkard in a white mackintosh, is it not possible that after the fatal event the plea would be made "I thought he was a ghost." It is difficult to regard the accused in such a case with anything but sympathy.

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[3] *R.* v. *Mohammed Hussain and Another* [1954] Lautoka Sessions.

[4] Kenny, *Outlines of Criminal Law* (16th edition), p. 48.

[5] *R.* v. *Molehane* [1942] G.W.L. 64.

That there is a sincere belief in the supernatural today in the colonies is demonstrated by their Ordinances. Nyasaland, for example, possesses a Witchcraft Ordinance, section 5 of which reads: "Any person who employs or solicits any person to name or indicate by the use of any non-natural means any person as the perpetrator of any alleged offence . . . shall be guilty of an offence." Section 48 of the Summary Offences Ordinance of Trinidad and Tobago reads: "Every person . . . by any occult means . . . shall intimidate or attempt to intimidate any person . . . shall be liable to imprisonment." The Fijian Affairs Regulations make it an offence to practice witchcraft and refer to the ceremony of "pointing the bone." The Trinidad and Tobago Ordinance also refers to specific ceremonies. It is to be noticed that these Ordinances do not refer to "pretended" practices. They refer to "non-natural means," implying that such means can be practised.

In the United Kingdom the word "pretended" in reference to witchcraft first appeared in the Witchcraft Act, 1735. This Act is now repealed by the Fraudulent Mediums Act, 1951. Section 1 of the 1735 Act made it an offence to "pretend to exercise or use any kind of conjuration of spirits." The first statute dealing with witchcraft, the statute 33 Hen. 8, c. 3, stated: "It shall be a felony to practise conjuration, witchcraft, enchantment or sorcery." The statute Jac. 1, c. 12, dealt most fully with various aspects of witchcraft, witches and the conjuration of spirits and the casting of spells. It would seem, therefore, that whereas in 1604, the date of the statute 1 Jac. 1, c. 12, the conjuration of spirits appeared to the legislators to be an accomplished fact, by 1735 their views had changed, for then the conjuration of spirits is referred to as being " pretended."

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[6] *R.* v. *Duncan* [1944] 2 All E.R. 220.

That public opinion had changed between these two dates is historically true for whereas in 1279 a jury could make the following presentment,[7]

> " An unknown woman, who was a witch (*sortilega*), entered the house of John of Kerneslaw at the hour of vespers and assaulted the said John because he signed himself with the cross above the candles when the Benedicite was said. And the said John defended himself as against the devil (*tanquam de diabolo*) and struck the witch with a staff so that she died. And afterwards, by the judgment of the whole clergy, she was burnt. Then John went mad and when he had recovered his wits and remembered what he had done, he fled. Upon this presentment the judgment is that since John is not suspected of any felony he may return if he pleases, but that his chattels are forfeited for the flight."

in 1751,[8] a person who killed an old woman believing that he had been bewitched by her was convicted of murder. Witchcraft trials are unknown in England after the beginning of the eighteenth century.

By comparing the English legislation concerning witchcraft with similar colonial legislation, it can be seen that whereas in 1735 in England there was already disbelief in the supernatural, in Nyasaland according to the wording of the relevant legislation, there is not. In other words, it can be said that today a native in Nyasaland holds similar beliefs to those held by an Englishman in the reign of James I and, just as James I considered it perfectly proper to burn old women whom he believed to be witches, so would a Nyasaland African.

Could such an African, when on trial for killing a witch, who to western eyes appeared to be an old woman, plead in his defence that he honestly and reasonably believed her to be a witch? By this defence he is saying that he is mistaken and that when he was killing a human being he was, in his mind, killing a supernatural one.

According to Kenny,[9] three necessities must be present before this defence is established:

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[7] Pollock and Maitland, *History of English Law* (2nd ed.) at p. 554 quoting *Placit. Abbrev.* 62.

[8] Radzinowicz, *History of English Criminal Law* at p. 217.

[9] Kenny's *Outlines of Criminal Law*, pp. 46–48.

(i) That the mistake must be of such a character that had the supposed circumstances been real they would have prevented liability from attaching to the person from doing what he did.
(ii) That the mistake was a reasonable one.
(iii) That the mistake, however reasonable, must relate to matters of fact and not of law.

There is no need to comment on the third necessity, but the first and second may furnish obstacles to an African who wishes to take advantage of this defence. The actual defence is contained in the first necessity. It has been enlarged upon by Cave J. in *R.* v. *Tolson* as follows[10]: "Honest and reasonable mistake of fact stands in fact on the same footing as absence of the reasoning faculty in infants or of that faculty in lunacy." It is clear that if an African shoots an old woman who at the time of the shooting he believes to be a supernatural being, then he has no intent to kill and no intention of killing a human being. That he has no intent to kill, is sufficient to secure his acquittal for the offence of murder for the killing must be intentional. But where manslaughter is concerned, several cases[11] decide that accidental shooting of a human being is manslaughter and thus the question of intent is immaterial. In the African's own mind, however, he is shooting a non-human being and therefore that belief should be sufficient to acquit him even of that offence. The accused should be judged in the same way as he would be judged if his mistaken belief was true.

Thus if the supposed ghost, witch or devil is seen through the eyes of the killer as a human being possessing magical powers, then the offence of murder is established, for in such a case the defence of mistake never commenced to operate. The killer did not consider his victim to be anything else but a human being.

The case of the "Hammersmith Ghost"[12] is in point here. Francis Smith was tried for the offence of murdering Thomas Milward or Milwood of Hammersmith at the Old Bailey Sessions, January 18, 1804. A number of persons had seen an apparition in the Hammersmith area. The prisoner, believing the apparition to be a human being, shot at it and killed Thomas Milward, a bricklayer, who was wearing a white smock, the uniform of his trade. The shooting took place late at night and in the dark. Evidence was given at the trial which suggested that the prisoner was doubtful of the nature of the being he was shooting but the fact that the prisoner went out with his gun in order to shoot a human being and, as he thought, to destroy a nuisance, destroys any possibility of the defence of mistake being established. Although the jury in this case first returned a verdict of manslaughter, Macdonald L.C.B. refused to accept it, and after Smith was found guilty of murder, he was reprieved.

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[10] 23 Q.B.D. 168 at p. 181.

[11] Such as *R.* v. *Campbell,* 11 Cox 323

[12] 65 *Law Quarterly Review*. Article entitled "Homicide and the Supernatural" by Glanville Williams. Anyone who writes articles of this kind must be indebted to Dr. Glanville Williams. This article is a masterly exposition and almost all the cases I have quoted are explained therein in detail.

The second necessity, that of reasonableness, presents some difficulty. Would any reasonable Englishman believe in the existence of devils, or is the standard to be of a reasonable African? Dr. Glanville Williams considers that the cases are conflicting [13] in regard to this. He quotes two cases which prima facie appear to be contradictory, *Thorne* v. *Motor Trade Association* [14] and *Bank of New South Wales* v. *Piper*.[15] Lord Atkin said in the former case: "I do not think that doubt should exist upon a well established proposition in criminal law that normally a genuine belief in the existence of facts apart from law which if they would constitute a defence, is itself a sufficient defence." Sir Richard Crouch said in the latter case: "On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which if true, would make the act charged against him innocent." It would seem that these remarks are not conflicting, for the words "a genuine belief" and "an honest and reasonable belief" are synonymous. They are different ways of saying the same thing, namely, that a true belief in the existence of a particular state of affairs is sufficient to support the defence of mistake.

One of the cases often quoted in this connection is that of *R.* v. *Dennis*.[16] A wife who was living apart from her husband heard a noise downstairs in her house during the night. In fact, her husband had forced his way in through a window. The wife, believing that she heard a burglar, fired a shotgun to frighten him away and killed her husband. She was tried for murder and acquitted. The Recorder of London summed up to the jury as follows:

> "In this case the prisoner says that she fired for the purpose of frightening the person who was downstairs. The questions for you are whether the prisoner had not reasonable grounds

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[13] *Criminal Law, The General Part,* by Glanville Williams at p. 49.

[14] [1937] A.C. at p. 809.

[15] [1897] A.C. at pp. 389, 390.

[16] 69 J.P. 256.

> to believe that the person was there for a felonious purpose and whether she fired for the purpose of frightening that person."

What difference would it have made if the Recorder had said: "Did the prisoner believe that the person was there for a felonious purpose"? In this, and many other similar cases, the use of the word "reasonable" is superfluous. All that the speaker means to convey is that the prisoner's belief in the existence of a state of facts should be believed by the jury. The question to be asked in the case of a man who shoots what he believes to be a demon, is "Did he believe the person to be a demon?", not, "Did he have reasonable grounds for that belief?"

That the belief may be one personal to the individual asserting it, or one not shared by the community as a whole, seems to be established law. The fact that the community from whom the devil-killer comes does not believe in the supernatural is immaterial. The case of *Wilson* v. *Inyang*[17] seems to decide once and for all that reasonableness does not mean reasonableness in the sense of everyday common practice or belief. A person may genuinely hold a belief which the general community considers unreasonable. Such a belief will support the defence of mistake. This is apparent from this latter case in the judgment of the Lord Chief Justice when he stated: "The Magistrate must apply ordinary principles and test the matter in the light of common sense, he should say that if a defendant had no reasonable ground for believing what he said he believed he was not acting honestly." The Lord Chief Justice continued: "But there may be exceptions; a man may himself believe that which no other man of common sense would believe. If he is acting without any reasonable grounds and has refrained from making proper inquiry, that is generally very good evidence that he is not acting honestly."

At first sight a number of cases appear to contradict this view. These are the cases in which members of a sect called the "Peculiar People" have been prosecuted for neglecting their children by not providing any or adequate medical attention for them. Members of this sect do not believe that doctors should be called to the sick and believe it is wrong to do so. In the case of *R.* v. *Downes*[18] a member of this sect was prosecuted for the manslaughter of his child. The jury found the following facts proved:

(i) That the prisoner neglected to procure medical aid for his child when it was reasonable to do so and when he had the ability.

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[17] [1951] 2 All E.R. 237.

[18] 1 Q.B.D. 25.

(ii) That death was caused by neglect.
(iii) That the prisoner bona fide, though erroneously, believed that medical aid was not required for a child.
(iv) That he bona fide believed it was wrong to call in medical aid.

It would appear that the third finding provided the prisoner with an adequate defence and that this would have been so at common law is accepted by Lord Coleridge in his judgment in this case when he said: " Had it not been for the statute to which we have been referred, I should have entertained great doubts about this case." He then went on to state that the statute in question: The Poor Law Amendment Act, 1868, made it an offence wilfully to neglect to provide medical aid for a child. The meaning of the word " wilfully " being " intentional " it was impossible to argue that the neglect had been caused in any other way. Lord Russell C.J. in a later case, *R.* v. *Senior,*[19] said: " It is important to observe that the Poor Law Amendment Act, 1868, was passed shortly after the trial of the case before Willes J. which has been referred to, *R.* v. *Wagstaffe*." He stated that he had very little doubt that the particular clause in question (section 37) was inserted on account of the decision in *R.* v. *Wagstaffe,* because the circumstances existing in that particular case were not adequately provided for. In *R.* v. *Wagstaffe* [20] two members of this sect were acquitted of the offence of manslaughter. The prisoners, who were husband and wife, refused to call a doctor to attend their dying child. One witness for the prosecution, a member of this sect, said, " We do not call in medical aid because we have so much proof of the healing power of God . . . a doctor is very well for those who do not believe in God." In the light of the Chief Justice's remarks in *Wilson* v. *Inyang,* quoted above, the summing up of Willes J. appears to be perfectly correct. He said:

> " But when the parents supply food and warmth and the question of the precise medical treatment arises there is much greater latitude, for at different times persons have come to different conclusions and even at the same period every person differs in his opinions from some others. Some years back it would be thought that the best treatment for a child afflicted with the King's Evil would be to take him to the Sovereign to be touched . . . over here, the majority would call in a medical practitioner . . . the question, however, is whether the prisoners held the belief that they did honestly."

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[19] [1899] 1 Q.B. 283.
[20] 10 Cox C.C. 530.

This last question could equally well have been expressed by saying: " Do you believe the prisoners when they said they held this belief? "

The African who puts forward this defence of mistake need not, therefore, be disturbed about the requirement of reasonableness. He is not to be judged by western standards or by the standards of his own community. The question that the jury should be asked is whether they believe him when he says he believed he was shooting at a supernatural being? "

A person tried by a court in the colonies may have an advantage over his counterpart in the United Kingdom. In most colonies criminal procedure and criminal law have been codified and matters which may exempt a person from criminal liability are statutory and are not defined by case law as in the United Kingdom. This is not a general rule but many colonies follow this practice and usually the relevant section follows the following wording, taken from the Kenya Penal Code:

> " A person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."

The same criticism applies to this section as to similar definitions laid down by English courts. The words " an honest and reasonable but " should be omitted so that the commencing phrases would read: " A person who does or omits to do an act under a mistaken belief . . . is not criminally responsible " because whether or not the belief is honest or not is entirely a matter for the jury which is proved or not proved in every criminal case. Furthermore, this section does not represent the law as it is today for a belief which is by general standards unreasonable may support this defence.

Such a defence when embodied in statute law gives the devil-killer an advantage over his counterpart in any country or colony where this defence is defined by precedent for being a general defence specified by statute it applies to all offences unless expressly excluded. Thus, *mutatis mutandis*, the case of *R.* v. *Downes* would have been differently decided in a colony where the defence was statutorily defined for it would apply to a statute such as the Poor Law Amendment Act, 1868, unless expressly excluded from the operation of the latter statute.

This defence is differently defined in the Criminal Code of British Honduras, section 25 of which reads as follows:

> "25.—(1) A person shall not be punished for any act which by reason of ignorance or mistake of fact in good faith he believes to be lawful.
>
> (2) A person shall not except as in this Code otherwise expressly provided be exempt from liability to punishment for any act on the ground of ignorance that such act is prohibited by law."

The basis underlying this form is that the doer of the act must believe it to be lawful but the basis underlying the Kenya section is similar to English rule that a person must be judged as though the believed state of affairs were real. A section which defines what is essentially a matter of fact by reference to what is often indefinite, the law, is clearly unsuitable and furthermore, although a person must believe the offence to be lawful, ignorance of the law is no excuse. This appears to be a contradiction.

In a previous paragraph of this article it was suggested that a Nyasaland African possesses a similar social background when considering supernatural matters, as possessed by an Englishman in the seventeenth century. It is not true to say, however, that colonies where legislation refers to the "pretended" use of witchcraft as distinct from the "use" of witchcraft are necessarily more socially advanced. Kenya, Uganda, Tanganyika, British Guiana, Nyasaland, and Jamaica possess a specific Witchcraft or Obeah Ordinance and in many other colonies witchcraft and its accompanying practices are made offences in the Criminal Code. The courts of most colonies have considered in detail the ceremonies of witchcraft. In the case of *R.* v. *Balaguela*[21] S/O Lutamba, for example, in Tanganyika, the Supreme Court in Revisional Jurisdiction referred to the "recognised tools" of a witch-doctor and specified what they are: six colonies possess witchcraft or Obeah Ordinances and many more possess Ordinances referring in part to witchcraft. Section 145 (7) (*a*) of the Summary Jurisdiction Offences Ordinance of British Guiana, for example, demonstrates the powers of the Postmaster-General of that colony in relation to postal packets and sorcerous matters and shows the extent of this kind of legislation. It reads as follows:

> "The Postmaster-General shall detain and search any postal packet of which he suspects to contain letters or printed matter giving instructions in witchcraft or sorcery or any sorcerous matter."

The wording of sections of these Ordinances which make sorcery or witchcraft an offence refer to the "pretended practice" of witchcraft or in some cases to the "practice" but in a few cases the reference is to both "pretended practice" and "practice." If the words used are "pretended practice" a person charged under the relevant section may allege that he can in fact practise witchcraft and may ask the court's permission to demonstrate his powers. This was one of the issues in the case of *R.* v. *Duncan* quoted above, and many witnesses gave evidence that Mrs. Duncan was capable of producing genuine spirit manifestations, she being charged with the pretended conjuration of spirits. It is difficult to understand how an application to demonstrate the particular powers in question can be refused by the court except on the ground, as in *R.* v. *Duncan*, that it was practically inconvenient. Nevertheless, it is better that the onus of proving the practice of witchcraft to be false or pretended should be upon the prosecution than for the prosecution to have to prove a specific act of conjuration for the use of the unqualified word "practice" in relation to the offence of witchcraft places the onus upon the prosecution and implies that witchcraft can be practised.

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[21] 1 T.L.R. (R.) 50.

Furthermore, generally speaking, colonial legislation makes no differentiation between a witch-doctor, a stage magician or conjuror, and a medium. In this connection it is to be noticed that the Fraudulent Mediums Act exempts from criminal liability anyone practising allegedly occult powers by way of entertainment. It would appear that in Kenya, for example, the Piddingtons would have committed an offence by performing their thought-reading act.

It was argued by the prosecution at the trial of Mrs. Duncan that a "pretended" medium was anyone who claimed to be a medium. If this interpretation is correct the application of colonial statutes is very much extended but to include in the same category, conjuror, witch-doctor, medium, and telepathist is manifestly wrong.

Returning once more to the question of mistake and homicide it can be said that the defence is applicable when a person kills a human being believing that being to be a supernatural one unless in his own mind the person in question is a human being possessing alleged magical powers. It could be said, therefore, that to support the defence it is not sufficient for a "human" being to be a devil, the devil must be a human being.

The difficulty that arises if this defence succeeds is that a social evil may result. If one tribe kills a second tribe honestly believing that all the members of the second tribe are devils, should the members of the first tribe be excused? The facts of the following case demonstrate the problem, for there is no doubt that the Indian who shot the supposed Wendigo should have been exonerated from all blame and yet one can appreciate and understand that if this had occurred it would be thought by the tribe concerned that the court believed in Wendigos and by others that Wendigos could be freely massacred.

> " The prisoner was a member of a tribe of Indians who believed in the existence of an evil spirit clothed in human flesh or in human form called a Wendigo which would eat a human being. He also believed that a Wendigo could be killed by a bullet. It was reported that a Wendigo had been seen in the neighbourhood and guards were accordingly posted to protect the tribe. The prisoner was one of these, and he saw what appeared to be a tall human being running at a distance, which he supposed was a Wendigo. He gave chase, and after challenging three times and hearing no answer fired and shot the object, when it was discovered to be his own foster-father, who died soon afterwards." [22]

It is rare to find such a perfect example of this defence as is found in the following case from South Africa.[23] The facts were that a woman was sitting naked on the tomb of her deceased child while her husband poured water over her. This occurred in the middle of the night near a lonely temple and was part of a fertility rite. A person suddenly appeared from the darkness and thinking him a ghost, the husband beat him to death and then running back to his village reported that a ghost had been killed. The man and wife were charged with murder and both were convicted by the court of first instance but were acquitted on appeal, the appellate court pointing out that at the time in question one would not expect human beings to be about and also that it was a common belief that ghosts haunted burial places.

Not only may belief in the supernatural support the defence of mistake but in a more civilised society it may demonstrate that the accused was insane. In an uncivilised society, the defence of provocation or self-defence might be based upon such a belief. An example of this occurred in a Canadian case [24] where one Red Indian was charged with murdering another, a sorcerer, who was believed to possess the power of life and death over human beings. This sorcerer threatened the accused in the presence of the accused's wife, who was seriously ill, that he would cause her death. Believing that he was saving his wife from certain death the accused killed the sorcerer. He was acquitted.

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[22] *R.* v. *Machekequonabe* (1894) 28 Ontario 309 quoted in article " Homicide and the Supernatural " (*supra*).

[23] *Criminal Law, the General Part,* p. 27—quoting (1926) S.Af.L.J. 445.

[24] Bishop, *Criminal Law,* 9th ed. Vol. I. 218–219.

It is interesting to note that the reported cases in which supernatural beings have played a part are usually of homicide. It is never alleged that someone rode a broomstick to the danger of the public or that banknotes are stolen by mistake for witches' gold. There is one offence not connected with homicide, however, in which belief in the supernatural plays a great part. In fact it is the basis of a fraud called "money doubling"[25] which is very common in Africa. The purport of the confidence talk in this kind of offence is often that the spirits will double the money of the tricked!

From the cases and matters referred to in this article one can adduce certain principles which are:

(1) A principle of established law in England may have to be altered to conform to the established social background of a colony and principles obsolete in England may have to be retained in a colony on account of that background.

(2) A person who kills a human being believing that being to be a supernatural one is not necessarily to be considered insane by reason of that belief and such a belief may support the defence of mistake provided that certain necessities are present.

(3) The issue as to whether or not the particular belief supporting the defence of mistake is reasonable is not a satisfactory test since an unreasonable belief may exempt from liability.

(4) The wording of colonial witchcraft statutes is often unsatisfactory.

In conclusion, it must be said that on account of this wording many actions which are offences in the colonies will not be offences in England. For example some stores in England advertise and possess a resident clairvoyant. Such a clairvoyant, since the repeal of the Witchcraft Act, 1735, commits no offence. In some colonies such advertising is an offence as is the pretence to advise persons by any non-natural means. The English Vagrancy Acts have no application to a respectable clairvoyant, although they do apply to itinerant fortune-telling. This kind of advertisement is regularly inserted in some weekly papers. "Luck Elf, she can help you in your life and the Pools, carry her around, hold her in your hand and wish, send —— to ——." While it is true to say that in England only an eccentric fringe of the population believes in such rubbish whereas in Ghana it has been said that supernatural beliefs "are characteristic of the majority of the peoples there,"[26] what of the future? It is noticeable that whereas English penal statutes exist to prohibit an established social evil, colonial statutes are passed to cope with a future happening or to ensure that a particular happening never occurs. Does this mean that in the future English people will still possess superstitious beliefs and the colonial peoples none? It will be an interesting development if in one hundred years' time there are no witch-doctors in Africa, but dozens in Wandsworth.

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[25] *British Journal of Delinquency*—Vol. VIII, No. 4. Article on "Money Doubling."

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Justin Lewis
1958

The Problem of Wounding With Intent

By ERIC STOCKDALE, LL.M., B.SC.(ECON.), *Barrister-at-Law*

A layman glancing at an Assize Calendar for the first time might be forgiven if, on seeing the long list of sexual offenders with a leavening of fraud and violence cases, he were to assume that the Assize must last for some weeks. In fact, of course, most of those prisoners will plead guilty and will be dealt with in about a quarter of an hour each. What of the accused who do not plead guilty?

At a typical Assize one may expect to find that of the five prisoners pleading not guilty three are charged with causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act, 1861, whilst the other two face trial on a charge of, say, arson or causing death by dangerous driving. The chances are that not one of the three charged with grievous bodily harm with intent will be convicted of that offence. They will either be found guilty of the misdemeanour of wounding, contrary to section 20 of the Act (*i.e.*, without any intent), or their plea of guilty to that lesser offence, coupled with a plea of not guilty to the graver offence, will be accepted by the court and by the prosecution.

Two of the three prisoners will doubtless have committed their offence in a Saturday night public-house brawl, and the third during a quarrel with his wife. The first two will probably be fined and the third given a conditional discharge; yet all three will originally have been charged with and indicted for committing a felony punishable with life imprisonment. The layman might once again be forgiven if he were to ask himself why a High Court judge was ever troubled with such comparatively trifling cases. Let us see why.

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[26] *British Journal of Delinquency*—Vol. VIII, No. 4.

The Background

For the reasons we must go back to the time when the two men who were subsequently fined are peaceably drinking beer at their respective locals. Suddenly an argument develops in each establishment, the landlord hears the sound of breaking glass, sees blood and calls the police who arrive within minutes.

The police officer in charge has two alternatives after arranging for medical treatment for the victim and after listening to the brief accounts given by the landlord and one or two of his customers. Either he can arrest the man who is said to have struck the blow in question, or he can let him go and subsequently obtain a warrant (or summons) for his arrest with the hope that he will be able to find him again. As far as the police are concerned the first is the better course for a number of reasons—apart from anything else the man is then more likely to make a statement including an admission than on the following days when he is quite sober and may have been advised, by friends with a record or by legal advisers, to say nothing.

Not having been present at the commission of the offence the officer can only arrest without a warrant if the felony has been committed (see *Archbold*, p. 1073), that is, only if there has been a section 18 offence and not for a mere section 20 offence, but he is probably entitled to assume that the felony has been committed on being told of the threats used by the accused and on seeing the victim's face covered with blood. When the threats are subsequently examined in the cold clear light of the Assize court it is obvious that they cannot have been meant, and once the victim has been cleaned up by the hospital it is clear that he has sustained little more than a scratch, but in the smoky public-house on a Saturday evening things often look worse than they really are. In the circumstances the officer decides to arrest his man on the spot. Having once made that decision to arrest without warrant the officer is not over-keen to proceed with the case on the basis that no felony has been committed. The accused is accordingly charged with and brought up before the examining justices for the felony of committing grievous bodily harm with intent. The apparent views of the police impress the lay Bench so the accused is duly committed for trial—to the next Assizes and not to the Quarter Sessions which cannot deal with a section 18 offence, it being punishable with life imprisonment.

At the Assizes

On the first day of the Assizes defending counsel will say to his opponent, with some truth, " You haven't a hope of getting a conviction on section 18," or alternatively the latter will ask him, " How about pleading to section 20? " If counsel for the defence thinks that there is a danger of his client going to prison even on a conviction for the lesser offence, *e.g.*, because of the man's record, or because of some particularly unsavoury facts disclosed by the depositions, he will be reluctant to advise him to plead Guilty if he insists that he has even a weak defence of, say, accident, which might succeed before a jury. (There are those who maintain that *any* defence *might* succeed before a jury; and that on no account should one's client ever plead Guilty.) However, if the judge, through his own clerk or through the Clerk of Assize, indicates that he will not send the assused to prison if he pleads guilty to the lesser offence, his counsel can, with complete propriety and without any qualms, strongly advise his client so to plead, for there is always a possibility of a conviction for the more serious offence if the trial should proceed. (There are those who maintain that a jury is capable of convicting of an offence despite a clear and accurate direction that there is no evidence at all.)

On the other hand, if the judge gives no hint of what is in his mind as a possible punishment, the trial will probably proceed and result, after a day's hearing, in a verdict of not guilty of the graver offence, but guilty of the lesser—a verdict which the jury may return whether the indictment contains a count relating to the latter offence or not.[1]

The case of the man who struck his wife will most likely proceed in a similar way, with the added hazard for the prosecution that their principal witness, the wife of the accused, may say anything. (This is one of the excellent reasons the police have for being reluctant to become involved in what are primarily matrimonial disputes.)

Multiply these three typical cases by a hundred or more, and you begin to wonder what could be done to save both the time of the Queen's Bench judges and the money of the ratepayer.

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[1] Prevention of Offences Act, 1851, s. 5.

It is submitted that at each stage of a wounding case such as the one described a minor alteration of the law or the practice would have the desired results.

Suggested Reforms

First, if the police were given power of arrest without warrant in section 20 cases, far fewer charges under section 18 would be made. The index to *Archbold*[2] shows the large number of statutes already giving such power in cases other than felony —from the Official Secrets Act to the Protection of Animals Act— so that the great constitutional lawyers would not necessarily turn in their graves at this further extension of the police power.

Second, if the examining justices should, despite the above suggested amendment of the law, have a section 18 charge before them, they should think twice before committing it for trial to Assizes as such, rather than to Sessions as a section 20 matter.

Third, the section 18 offence could be made triable at quarter sessions, *e.g.*, by reducing the maximum penalty from life imprisonment to, say, fourteen years, for it is the extent of the maximum penalty, which is probably never used, which makes sessions unable to try the offence.[3] This amendment would not be necessary if the first two suggestions were carried out, for only "genuine" section 18 cases would then go to Assizes. Similarly, the second suggestion loses most of its force if this one is carried out.

Fourth, at the trial of a wounding case, whether at Assizes or at sessions, the judge should make a point of letting counsel know if he is prepared to accept a plea to the lesser charge and if he takes the view that prison is not necessary. The judges often do take this course—and the justices sometimes refuse to commit a case as a section 18 one—but it is submitted, nevertheless, that reform on the lines indicated would be salutary.

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[2] 33rd ed., p. 1603.

[3] *Archbold*, p. 94.

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Practice and Procedure

Magistrates' Courts

Reduction in period of imprisonment on account of part payment

In construing a statute or regulations made in exercise of powers conferred by a statute the courts usually feel under an obligation to attribute some meaning and effect to the words enacted by Parliament or promulgated by the appropriate authority, however difficult a task this may be in dealing with the complicated wording of much modern legislation.

It is difficult, however, to see that any effect can ever be attributed to the simple wording of Rule 45 (4) of the Magistrates' Courts Rules, 1952. Rule 45 deals with payment of a sum of money after imprisonment has been imposed and with reduction of the period of imprisonment on account of part payment. Sub-rule (4) provides that " If the said period is reduced through part payments to one day, the defaulter may be detained within the precincts of the court-house . . . "

In view of the procedure for calculating remission laid down by section 67 of the Magistrates' Courts Act, 1952, it would appear that this part of rule 45 can never have any effect. Subsection (2) of section 67 provides that " Where, after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum . . . payment is made . . . of part of the sum, the period of detention shall be reduced by such number of days as bears to the total number of days in that period less one day the same proportion as to the amount so paid bears to so much of the said sum . . . as was due at the time the period of detention was imposed." Subsection (3) of the same section provides that " In calculating the reduction required under the last preceding subsection any fraction of a day shall be left out of account."

The operation of this section is best illustrated by a practical example. Let us suppose that a fine of £100 is imposed with the alternative of twenty-eight days' imprisonment. The defendant makes a part payment of £99, and the court then decides to issue a commitment warrant for the balance. The reduction for the part payment is $^{99}/_{100}$ times (28–1) days—

i.e., $^{99}/_{100}$ times 27 days,
= $26\,^{73}/_{100}$ days.

By virtue of subsection (3) of section 67 the fraction must be ignored, and the reduction is twenty-six days, leaving two days to be served.

It will be apparent that, however great the part payment, since it is only a part payment, the reduction will be only a part of "the total number of days . . . less one day" of subsection (2) of section 67—in the example the reduction was $26^{73}/_{100}$ days against a "total number of days . . . less one day" of twenty-seven. By virtue of subsection (3) of section 67 any fraction must be ignored, and so the reduction must always be at least one day less than "the total number of days . . . less one day," and, consequently, it must always be at least two days less than the period of imprisonment, leaving no room for the operation of rule 45 (4). [ARTHUR BURT, LL.B., Barrister-at-Law.]

Summary Justice

Advertising

For displaying posters without obtaining the permission of the owner of the land, contrary to regulations made under the Town and Country Planning Act, 1947, the secretary of a Round Table was fined £2; Price: Ealing Magistrates' Court (*Manchester Guardian*, August 16).

Assault

When a police constable told a group of men that, under the provisions of the Litter Act, 1958, they were bound to pick up broken glass and food which they had scattered about, a struggle broke out and within ten minutes three police officers had been assaulted; of the four men involved two were each fined £2 for being drunk and disorderly, three were each fined £10 for assaulting police officers and £2 for obstructing police officers; Nash: Southend Magistrates' Court (*The Times*, August 20).

Clean air

Two firms were fined £5 and £10 respectively for emitting black smoke from their premises contrary to regulations made under the Clean Air Act, 1957. In one case the smoke was the result of burning unsuitable materials in an incinerator; in the second the emission of smoke was not denied but it was alleged that, as it had been caused by essential maintenance work no offence had been committed; the magistrates found the case proved; Clifford Coverings Ltd. and Bellis & Morcom, Ltd.: Birmingham Magistrates' Court (*Birmingham Mail*, August 18).

False pretences

After pleading guilty to charges of obtaining credit by false pretences from the mess president of the R.A.F. station at Odiham, Hampshire, a civilian who had posed as a naval sub-lieutenant was conditionally discharged and put on probation for twelve months; the defendant asked that four similar offences be taken into consideration; Stanton: Odiham Magistrates' Court (*Manchester Guardian,* August 20).

Larceny

Three charges of stealing children with intent to deprive the father of their possession were dismissed after one of the boys had agreed that he liked the defendant's cottage, and that he and his brothers enjoyed going there because they had a lot of fun. He also agreed that the defendant had not asked them to stay there. The charge, under section 56 of the Offences against the Person Act, 1861, was brought after three boys, aged ten, eight and seven, had spent three days at the defendant's cottage while the police were searching for them; Maclean: Manchester Magistrates' Court (*The Times*, September 3).

Solicitors

A charge of drafting a legal agreement in expectation of a fee while not being a solicitor, contrary to section 20 of the Solicitors Act, 1957, was dismissed by the Wolverhampton stipendiary magistrate, who said that, although the case had been very properly brought, there was no suggestion of fraud and that, even if he had decided to convict there would have been an absolute discharge. The Act was not intended to create a closed shop for solicitors but to protect the public against misunderstandings and the possibility of fraud in " home-made " leases, such as the one drawn up by the defendant; Mahon: Wolverhampton Magistrates' Court (*Birmingham Mail*, August 28).

Case and Comment [*]

AIDING AND ABETTING

Act of assistance voluntarily done—knowledge of circumstances—motive irrelevant

National Coal Board v. Gamble

Queen's Bench: Divisional Court: Lord Goddard C.J., Slade and Devlin JJ.: [1958] 3 W.L.R. 434.[1]

M., the servant of a firm of hauliers, drove his lorry to a colliery which was occupied by the National Coal Board, to collect coal. The lorry was there filled with coal. M. then drove the lorry to a weigh-bridge where H., who was the operator of the weigh-bridge and an employee of the board, told M. that the lorry together with its load was nearly 4 tons overweight. M. told H. that he would risk taking the overload, took a weigh-bridge ticket from H., and drove away from the colliery. Subsequently M. was stopped by the police, and his firm was later convicted of contravening the Motor Vehicles (Construction and Use) Regulations, 1955. Subsequently the Board was charged with aiding and abetting the firm in the commission of an offence, and was convicted by a magistrates' court. On appeal to the Divisional Court by way of case stated:

Held (Slade J. dissenting), that the crime of aiding and abetting was committed on proof of a positive act of assistance voluntarily done, and a knowledge of the circumstances constituting the offence, the question of motive being irrelevant; that the property in the coal did not pass to the buyer until the coal was weighed and the weigh-bridge ticket handed to M., and that the completion of the sale of the coal at that moment by H., as agent for the board, with the knowledge that an offence was going to be committed constituted the board aiders and abettors. [D.C.]

Commentary. Two qualifications to the effect of this decision, arising from the fact that the National Coal Board called no evidence and accepted responsibility for H.'s acts, should be noted:

(1) On a charge of aiding and abetting there is no question of

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the National Coal Board: *John Thompson Q.C.* and *Denis Cowley* (instructed by Donald H. Haslam for Lawrence C. Jenkins, Nottingham). For the prosecutor: *P. Ashworth* (instructed by Kingsford, Dorman & Co. for D. G. Gilman, Derby).

vicarious liability: *Ferguson* v. *Weaving* [1951] K.B. 814. If H.'s employer had been a human being, there could have been no question of his being held liable. As the employer was a corporation, it could be held liable only if H.'s acts could be held to be the corporation's acts and his *mens rea* its *mens rea.* See *R.* v. *I. C. R. Haulage, Ltd.* [1944] K.B. 551; *D. P. P.* v. *Kent & Sussex Contractors, Ltd.* [1944] K.B. 146. It is thought that H.'s office was of much too inferior a nature for it to be so held—but the point was apparently conceded by the Board.

(2) Importance was attached by the court to its finding that H. had a right, on discovering that the load was overweight, to refuse to transfer the property in it. But if H. did not know this, then, as Devlin J. pointed out, he had no *mens rea.* This point, however, said Devlin J., could not be relied upon as H. was not called.

Slade J.'s dissent was based on the fact that he thought that aiding and abetting means that an act is done with the motive of assisting in the commission of the crime. Devlin J. thought motive irrelevant if actual assistance is knowingly given—and it is respectfully submitted that this view is to be preferred.

APPEAL

Quarter sessions—jurisdiction

Banks v. Plane

West Riding of Yorkshire Quarter Sessions Appeal Committee: His Honour Judge D. O. McKee (Chairman): June 30, 1958.[2]

B. appealed from an order of Brighouse Borough Magistrates under the Police (Property) Act, 1897, whereby they ordered that certain goods which had been taken from the appellant by the police and retained by them in their possession should be handed over by them to certain other persons who claimed to be the lawful owners. B. had been charged with shop-breaking and stealing and had been committed by Brighouse magistrates to quarter sessions, where he had pleaded Not Guilty but had been convicted.

Held, that the Appeal Committee had no jurisdiction to hear the appeal, as it could not be brought within the wording of section 83 of the Magistrates' Courts Act, 1952. It was not a " sentence " within the meaning of section 83, since even if it were assumed that the words of section 83 (3): " . . . any order made on conviction by a magistrates' court," included orders made by a magistrates' court after a conviction before another court (which, in view of the wording of section 83 (1): " A person convicted by a magistrates' court may appeal . . . ," was clearly wrong), this was not such an order. It was quite independent of any conviction, and was in no way analogous to a restitution order, as it was merely an order disposing of property which had come into the hands of the police. B.'s sole remedy was to bring a civil action against the persons to whom the magistrates' court had ordered the property to be handed over. [JOHN M. COLLINS, Barrister-at-Law.]

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[2] The appellant in person. For the respondent: *G. F. P. Mason* (instructed by R. C. Linney, County Prosecuting Solicitor).

Commentary. Where any property has come into the possession of the police in connection with any criminal charge, a court of summary jurisdiction may, under section 1 (1) of the Police (Property) Act, 1897, make an order for the delivery of the property to the person appearing to be the owner. By section 1 (2) such an order does not affect the right of any person to bring an action, within the six months from the date of the order, against the person who, in consequence of the order, is in possession of the property; but thereafter the right ceases.

The Act simply requires that the property shall have come into the possession of the police "in connection with" a criminal charge and an order may be made even though there has been no conviction. An order made on conviction, on the other hand, means an order made *as a consequence of* a conviction: *R.* v. *London Sessions, ex p. Beaumont* [1951] 1 K.B. 557. The test applied seems to have been whether the order could be made if there was no conviction. If it could, it was not an order "made on conviction."

CERTIORARI

Licensing authority—refusal of licence on ground that vehicle used in manner contrary to normal user declaration

R. v. Transport Tribunal, ex p. T. Hesketh, Ltd.

Queen's Bench: Divisional Court: Lord Goddard C.J., Slade and Devlin JJ.: June 30, 1958.[3]

In 1951 H. Ltd. applied to the N.W. Licensing Authority for the renewal of an "A" licence for an articulated vehicle and trailer. At the time the Transport Act, 1947, was in force, and that Act prohibited the carriage of goods in vehicles owned by a haulage business not taken over to 25 miles from the vehicle's operating centre. In applying for the renewal of the licence H. Ltd. stated that the facilities they proposed to provide were the carriage of "all I.C.I. goods as required." On July 22, 1954, however, they ceased to carry I.C.I. goods and, after the restrictions on "A" licensed vehicles had been removed by the Transport Act, 1953, which came into force on May 6, 1955, they used the vehicle for all classes of goods without restriction. On June 2, 1956, they applied for a further renewal of the " A " licence but it was refused by the deputy licensing authority on the basis that the vehicle was not needed. The Transport Tribunal, to whom H. Ltd. appealed, refused to renew the licence on the ground that H. Ltd. had used the vehicle in a manner contrary to the normal user declaration which they had made when applying for the licence previously. On an application by H. Ltd. for an order of certiorari to bring up and quash the decision of the tribunal on the ground that they were not entitled to refuse the renewal of the licence on that ground:

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[3] For the appellant: *Harold Brown Q.C.* and *D. B. McNeil* (instructed by Holt, Beever & Kinsey for Mr. E. A. Whitehead, Liverpool). For the respondent: *E. S. Fay Q.C.* and *J. Edward Jones* (Mr. M. H. B. Gilmour).

Held, that section 15 (14) of the Road Traffic Act, 1933, gave the Transport Tribunal power to make such order as it thought fit; accordingly, it could exercise its discretion in any way it liked, and its decision could not be questioned unless it was quite clear that it had acted in an injudicial manner. If the tribunal deprecated the conduct of H. Ltd. who had used the vehicle in a way contrary to the declaration as to user they had made when they applied for the licence, the court could not say that was wrong. The tribunal had exercised its discretion in a judicial manner. The appeal was dismissed.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

Commentary. Certiorari lies " wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority ": *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 205, *per* Atkin L.J. In the present case the Tribunal was acting within the scope of the authority created by section 15 (14) of the Road Traffic Act, 1933, and transferred to the Transport Tribunal by section 73 of the Transport Act, 1947, and S.I. No. 1467 of 1951.

Summary trial—taking and driving away

See *Ex p.* RIGBY, p. 694, *post.*

GAMING AND WAGERING

Conducting the business of a common gaming house

Phono-Sound, Ltd. v. Lazenby

West Riding of Yorkshire Quarter Sessions Appeal Committee: A. B. Goss, Esq. (Chairman): June 30, 1958.[4]

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[4] For the appellant: *H. G. Bennett* (instructed by Louis Godlove & Waterman, Leeds). For the respondent: *V. R. Hurwitz* (instructed by R. C. Linney, County Prosecuting Solicitor).

Phono-Sound appealed from a conviction by Castleford magistrates for acting in conducting the business of a common gaming house contrary to section 4 of the Gaming Act, 1845. W., the proprietor of a café in Castleford kept in his café certain automatic fruit machines. It was not disputed that these machines were gaming machines or that their presence rendered W.'s café a " gaming house " within the meaning of the Act. The arrangement between W. and the owners of the machines was that they should take 75 per cent. and he 25 per cent. of the profits from the machines. W. stated that he did not in fact know who were the suppliers of the machines, but that if the machines broke down he had to ring a certain telephone number, when the owners would send their mechanics down to repair the machines. The telephone number was that of Phono-Sound, Ltd. The owners of the machines were in fact an associated company, Caroline Automatics, Ltd., of which the managing director of Phono-Sound was also a director. Caroline Automatics had no telephone of their own and used Phono-Sound's telephone. All calls for them would be put through to them by an employee of Phono-Sound.

The respondent contended that the words of section 4: " . . . every . . . other person who shall act in any manner in conducting the business of any common gaming house " were wide enough to include the facilitating of the business being carried on by Caroline Automatics by enabling them to communicate with the operators of their machines. Even acting merely as a conduit pipe for messages would be sufficient:

Held, the words quoted should be read *ejusdem generis* with the remainder of the section, which referred to owners, keepers and managers of gaming houses, and to bankers and croupiers. Even assuming that the object of Caroline Automatics were known to the appellants, and that they knew of the illegality, it was straining the wording of the section to say that a person acting merely as a conduit pipe was liable thereunder. Appeal allowed with costs. [JOHN M. COLLINS, Barrister-at-Law.]

Commentary. The *ejusdem generis* rule is to the effect that " where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified ": *R.* v. *Edmundson* (1859) 28 L.J.M.C. 213, *per* Lord Campbell C.J. *Cf.* [1956] Crim.L.R. 772.

A question which does not seem to have been considered is whether Phono-Sound, Ltd., even though not guilty as principal in the first degree, might not have been convicted as an aider and abetter. The restrictive interpretation of the statute adopted by the court would not, of course, have affected this. It would have been necessary to prove that they had knowledge of " the essential matters which constitute the offence" (*Johnson* v. *Youden* [1950] 1 K.B. 544, *per* Lord Goddard C.J.) and that they facilitated the commission of it. *Cf.* Glanville Williams, *The Criminal Law*, § 55.

HABEAS CORPUS

Sentence on five counts—one count quashed—sentence unaltered—whether detention lawful—whether appeal lies

Re Hastings

Court of Appeal: Hodson, Morris and Sellers L.JJ.: *The Times*, July 28, 1958.[5]

H. was convicted upon an indictment containing five counts and sentenced to four years' corrective training. On appeal to the Court of Criminal Appeal the conviction in respect of the first count was quashed, but the court declined to interfere with the sentence which had been passed. H. applied for a writ of habeas corpus on the ground that no lawful sentence existed upon him, and that he was accordingly unlawfully detained. The Divisional Court dismissed the application ([1958] Crim.L.R. 332). On appeal to the Court of Appeal from the decision of the Divisional Court:

Held, dismissing the appeal, following *Ex p. Woodhall* ((1888) 20 Q.B.D. 832) that the Court of Appeal had no jurisdiction to hear the appeal. Section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, provided that "No appeal shall lie except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter." This appeal arose in a criminal cause or matter. [D. C.]

Commentary. "The distinction between cases in which it is possible to appeal from a refusal to grant a writ of habeas corpus, and cases in which no appeal is possible, turns on the nature and character of the proceedings in which habeas corpus is sought. If the matter is one, the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal and there can be no appeal from a refusal to grant the writ": *Amand* v. *Home Secretary* [1943] A.C. 147.

In non-criminal matters a person who alleges that he is illegally detained may appeal to the Court of Appeal and the House of Lords from the ruling of a judge or Divisional Court.

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[5] For H.: *A. P. Marshall Q.C.* and *Neil Butter* (instructed by Field, Roscoe & Co. for Keith Moore, Birkenhead). For the Governor of Liverpool Prison and the Secretary of State for the Home Department: *Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn* and *George Bean* (instructed by the Treasury Solicitor).

MURDER

Capital murder—" in the course or furtherance of theft "—meaning —direction to jury—Homicide Act, 1957, *s*. 5 (1)

R. v. Stokes

Leeds Assizes: Edmund Davies J.: July 21, 22, 23, 1958.[6]

S. was charged with and pleaded " not guilty " to capital murder. He pleaded " guilty " to murder. The case for the prosecution was that the accused killed a 75-year-old woman in the course or furtherance of theft, a wallet belonging to the deceased having been found in his possession. The accused stated that he went to the woman's house for an innocent purpose and, although he killed her in the course of an argument, he did not steal and he had acquired the wallet elsewhere. He was convicted of capital murder. In the course of his summing-up to the jury Edmund Davies J. said: " What is meant by the phrase ' in the course or furtherance of theft ' ? The Act of 1957 defines the word ' theft ' in this way: ' " theft " includes any offence which involves stealing or is done with intent to steal ' ; but, not surprisingly you may think, it contains no definition of the phrases ' in the course of theft ' or ' in furtherance of theft,' and those phrases are left by the statute to be interpreted by the jury in accordance with their ordinary understanding of those words and phrases. Accordingly, my observations in regard to the meaning of those words and phrases are intended to be helpful to you but they must in no sense be regarded as judicial directions as to their interpretation. It is not for a judge to tell a jury the meaning of ordinary words in a language which is as much theirs as his.

" What does ' in the course of ' mean, do you think? According to the *Concise Oxford Dictionary* the phrase may be regarded as conveying (amongst others) the meaning of ' during '—during theft —but remember that any paraphrase must be regarded only in the light of the actual words used in the section of the Act of Parliament. The same dictionary defines the phrase ' to further,' which you may think is not removed substantially from the phrase ' in furtherance of,' as ' help on, promote, favour.' Some instances you may think obviously would amount to murder in the course or furtherance of theft. For example, a man burgles a house and then, when he is in the very act of putting the swag into his bag, he is disturbed by the householder and murders him. You would probably think that would clearly be murder in the course of theft.

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[6] For the prosecution: *Bernard Gillis Q.C.* and *R. Rawden-Smith* (instructed by the Director of Public Prosecutions). For the defence: *G. S. Waller Q.C.* and *W. R. Steer* (instructed by Molineux, McKeag & Cooper, Newcastle-upon-Tyne).

"It is not necessary, you may think, that the theft should actually be effected and completed, and Mr. Waller was in agreement with that view or interpretation of these words. For example, supposing in the circumstances I have just given to you, the burglar was disturbed before he could actually put his hand on a single article. That fact does not, you may think, in any way prevent his murder of the householder who disturbs him before he could steal from being a murder in the course or furtherance of theft.

"But, on the other hand, you may think that at a time before the murder was committed at the very least it must be conclusively shown, first, that an intention to steal had already been formed by the accused and, secondly, that some step had been taken by him to give practical effect to that intention. To amount to capital murder it is not sufficient for the prosecution to establish that both murder and theft have been committed by the accused. The murder must be proved—in the words of the statute—to have been 'done in the course or furtherance of theft.' Let me give a hypothetical example to illustrate that. Bad feelings break out between two men over a girl; jealousy overcomes one of the men and in his jealous anger he kills his rival; and then, seeing his rival's body lying on the ground, he gives way to a further temptation and removes from his wrist the watch which he has worn and makes away with it. There murder has been committed, theft has been committed, but the former—the murder—clearly would not have been committed in the course or furtherance of the theft."

[G. M. Smailes, *Barrister-at-Law*.]

Commentary. The phrase "in the course or in the furtherance of" is examined in detail by Mr. J. W. C. Turner in his new editions of Russell on *Crime* (p. 554 and 615) and Kenny's *Outlines of Criminal Law* (p. 146).

Mr. Turner suggests that "in the course of" and "in the furtherance of" mean different things but that "both must relate to what is done *before* the felony has been completed. The reasons are (a) that once a felony has been committed it is automatically completed and becomes a past event; hence its 'course of commission' is also at an end; and (b) that the word 'furtherance' means 'the action of helping forward' and points to something which aids the attainment of some objective" (Kenny, p. 146).

The example of the burglar given by Davies J. in the present case shows that this analysis, logical though it is, may present difficulties. The burglar in the example has completed the felony of burglary as soon as he enters the house and that of larceny as soon as he moves "the swag" (*R.* v. *Simson* (1664) Kel.(J.) 31) for he could undoubtedly be convicted of both these crimes even though he did no further act. According to Mr. Turner's test, therefore, the subsequent killing would not be in the course or in the furtherance of theft.

The view of Davies J. seems, with respect, to produce a more common-sense result. A reasonable jury, it is submitted, "would probably think that would clearly be murder in the course of theft." It would be strange if the result (on which the burglar's life depends) should vary according to whether he was interrupted just before or just after he picked up the swag. On the other hand, a line has to be drawn somewhere. Is the burglar still in the course of committing theft (a) as he walks out of the house? (b) as he drives home in his car? or (c) as he shows the swag to his wife? Mr. Turner's test has the great merit of drawing a precise line—but it seems to draw it too early.

This is the second case in which it has been said that the meaning of words used in the Homicide Act is a question for the jury. See *R.* v. *Spriggs* [1958] 2 W.L.R. 162; [1958] Crim.L.R. 190. Yet it is well-established that the construction of statutes is a matter of law and exclusively within the province of the judge. If a burglar were to kill while walking out of the house, it is submitted that it would be the judge's duty to give a ruling on the point.

Unlawful chastisement—intent to cause grievous bodily harm—manslaughter

R. v. Pennington

Court of Criminal Appeal: Lord Goddard C.J., Donovan and Ashworth JJ.: July 28, 1958.[7]

P. was convicted at assizes of the murder of a child aged two years eleven months, and sentenced to imprisonment for life. The child was the child of a woman with whom P. was living and the cause of death was a haemorrhage of the brain as a result of a blow on the head. The evidence at the trial was that P. had struck the child on the head with his hand so that the child's head struck the wall. The medical evidence was that this blow was one of moderate severity and that it was extremely rare for a haemorrhage of this nature to follow. The prosecution did not suggest that there was any intent to kill but that P. ought to have known, as a reasonable man, that the blow would cause grievous bodily harm. The defence was that the blow exceeded lawful chastisement, and that P. was guilty of the lesser offence of manslaughter. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the blow on the child's head was unlawful and went beyond proper chastisement. The case was such as to call for a careful direction to the jury on the alternatives of murder and manslaughter but such a direction was unfortunately not given. In the circumstances the court would exercise its powers under section 5 (2) of the Criminal Appeal Act, 1907, and would substitute a verdict of manslaughter for the verdict of murder. The sentence would be reduced to one of five years' imprisonment.

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[7] For the appellant: *W. G. Morris* and *A. W. Bell* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *H. I. Nelson* Q.C. and *K. Burke* (instructed by the Director of Public Prosecutions).

[H. P.]

Commentary. It seems to be well established that it is at least manslaughter to cause death by an unlawful blow, even though the blow was not likely, and was not intended, to cause death or even grievous bodily harm. *Cf. R.* v. *Woods* (1921) 85 J.P. 272, where Avory J. told the jury: " If the death of the deceased boy was caused by an unlawful blow inflicted by the defendant, then he is technically guilty of manslaughter."

If the blow was intended to cause grievous bodily harm and death results, that is murder: *R.* v. *Vickers* [1957] 3 W.L.R. 326. Even if the accused did not intend the blow to cause *grievous* bodily harm, but it was so likely to do so that a reasonable man in his position would have foreseen that such harm was likely to result, then, according to the much criticised (but, nevertheless, binding) decision in *R.* v. *Ward* [1956] 1 Q.B. 351, that too is murder. *Cf.* S. Prevezer, " Murder by Mistake " [1956] Crim.L.R. 375.

The distinction between murder and manslaughter was not, apparently, made clear to the jury and it was, therefore, necessary to substitute a verdict of the lesser crime.

ROAD TRAFFIC

Driving licence—epilepsy

Re Alborough's Application

Lincoln (Kesteven) Magistrates' Court: August 21, 1958.

A. was appealing against the decision of the Kesteven County Council not to grant him a driving licence. The county council's solicitor submitted that he was not a person aggrieved within the meaning of subsection (5) of section 5 of the Road Traffic Act, 1930, as the licensing authority having ascertained that he was suffering from epilepsy had no option but to refuse to grant him a licence in view of the wording of subsection (2) that in the case of a person suffering from a prescribed disease the licensing authority shall refuse to grant a licence. The case of *R.* v. *Cumberland Justices* [1931] J.P. 206 was cited to the magistrates, and it was pointed out that if a person suffers from epilepsy the court is in no better position than the licensing authority, and cannot grant the applicant a licence as they, too, must deal with him as the statute requires him to be dealt with.

In the case before the court the complainant had not stated in his application form that he was suffering from epilepsy but it was a case where the licensing authority, after receiving other information, and inquiring into the matter, were satisfied that the complainant was suffering from the disease. The council's solicitor contended that the question as to whether or not the complainant has or has not epilepsy was not a matter for the court but was a matter entirely for the licensing authority in view of the wording of the section "if the licensing authority are satisfied." The cases of *Robinson* v. *The Minister of Town and Country Planning* [1947] 1 All E.R. 851 and *Liversidge* v. *Anderson* [1942] A.C. 206 were cited in this connection. The section meant that it was for the licensing authority to inquire into the matter, and for them alone to consider, and the court could not inquire into the reasons why the licensing authority were satisfied. The licensing authority being satisfied in this case that the complainant was suffering from epilepsy had no option but to refuse to grant the licence, and as the court could not consider whether the complainant was or was not suffering from epilepsy, as that was a matter for the licensing authority, the complainant in these circumstances was not aggrieved. The court accepted this contention and decided that the complainant was not a person aggrieved and, therefore, they could not hear the case.

Commentary. This decision, perhaps, derives some support from *R.* v. *Metropolitan Police Commissioner*, *ex p. Parker* [1953] 1 W.L.R. 1150; [1953] 1 All E.R. 717. There it was held that the power, given to the Commissioner to revoke a cab-driver's licence "if he is satisfied . . . that the licensee is not a fit person to hold such a licence," was of an administrative and not of a judicial or quasi-judicial nature, and therefore certiorari did not lie. The present case differs in the important respect that it is concerned, not with certiorari, but with the extent of a statutory right of appeal. Its effect is, presumably, to restrict the right of appeal under section 5 (4)—which gives the authority discretion to revoke a licence where they "are satisfied" that the licence holder is suffering from such a disease or disability as is likely to cause his driving to be a source of danger to the public. Yet section 5 (5) contemplates an appeal from the revocation as well as the refusal of the licence.

The case is inconsistent with *Re Leddington's Application* [1958] Crim.L.R. 550 where the court actually re-considered the question whether the applicant was suffering from epilepsy and apparently decided that he was not. (But see [1958] Crim.L.R. 636, and below, p. 695.)

Road and Rail Traffic Act, 1933 — *Private Carrier's Licence — Whether lorry used for or in connection with any trade or business*

Wyles (Chief Inspector of Police) v. White

Birmingham Stipendiary Magistrates' Court: August 12, 1958.[8]

W. was summoned that on April 17, 1958, he used a certain goods vehicle, to wit—a motor-lorry, for the carriage of goods for or in connection with a certain trade or business carried on by him otherwise than under a licence granted under Part I of the Road and Rail Traffic Act, 1933, contrary to section 1 of the said Act. He pleaded " Not Guilty."

The facts, which were not in dispute, were that W. was a coal merchant who did a little buying and selling of old motor vehicles as a side line and had purchased the motor-lorry in question in October, 1957. It was intended, eventually, to be used in his business but was in very bad condition and required a lot of repair before it could be put on the road. Various repairs were carried out from time to time and various tests made with the vehicle but it was still not satisfactory. The vehicle was fully and properly insured but no " C " licence had been applied for, although the defendant held " C " licences in respect of two of his other vehicles.

On April 17, 1958, the defendant instructed his driver to load the vehicle with scrap iron to the weight of 30 cwt. so that it might be tested when carrying a full load. Whilst on this test run the lorry was stopped and the present proceedings resulted.

It was contended on behalf of the prosecution that as the test run did not fall within the exemptions as set out in regulation 2 of the Road and Rail Traffic Act (Exemption) Regulations, 1957, and as the vehicle was intended to be utilised in the future in connection with the defendant's business then the testing of the vehicle was " for or in connection with any trade or business carried on by the defendant " and a licence was required.

For the defendant it was submitted that the user on this particular occasion was one for which a licence was not required. The load was not being delivered anywhere or picked up anywhere other than being taken from the defendant's premises to be returned to the defendant's premises and, therefore, section 9 applied in that the vehicle was being used for a purpose for which it might lawfully be used without the authority of a licence.

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[8] For the prosecution: Mr. R. M. Dunstan (Deputy Prosecuting Solicitor of Birmingham). For the defendant: Mr. G. S. Jonas, Solicitor (Charles C. Ladds).

The stipendiary magistrate dismissed the summons, holding that at the time the vehicle was not being used in connection with the trade or business of the defendant within the meaning of the statute.

Commentary. By section 36, "'goods' includes goods or burden of any description," and it has been held that it is not necessary to show that the goods were carried for sale: *Clarke* v. *Cherry* [1953] 1 W.L.R. 268, where a window cleaner was convicted for carrying the apparatus of his trade in his van. If the window cleaner had loaded his van with an equivalent weight of scrap-iron, to see if it would carry the apparatus, he would not, according to the present case, be guilty; which seems a very reasonable result, for the carriage of scrap-iron could hardly be said to be "for or in connection with" the trade of window cleaning. The facts of the present case are essentially the same.

Taking and driving away—summary trial—certiorari

Ex p. Rigby

Queen's Bench: Divisional Court: Devlin and Ashworth JJ.: [1958] 1 W.L.R. 843.[9]

R. was charged at Bow Street Magistrates' Court with the offence of unlawfully taking and driving away a motor-vehicle without the consent of the owner, contrary to section 28 of the Road Traffic Act, 1930. Such an offence is triable summarily or on indictment. The charge was read out to R. He was then asked to plead, and pleaded guilty. The prosecutor then stated the facts of the case, and counsel for R. addressed the court in mitigation. At no time did the prosecutor apply to the court for the case to be tried summarily pursuant to section 18 (1) of the Magistrates' Courts Act, 1952. Section 18 (1) provides: "Where an information charges any person with an offence that is . . . both an indictable offence and a summary offence, the magistrates' court dealing with the information shall . . . proceed as if the offence were not a summary offence, unless the court, having jurisdiction to try the information summarily, determines on the application of the prosecutor to do so." Upon an application for leave to apply for an order of certiorari,

Held, dismissing the application, and applying *James* v. *Bowkett* [1952] 2 T.L.R. 100, that an application for the summary trial of an offence may be " made " by a prosecutor, within the meaning of section 18 (1), either expressly or by implication from his conduct; and that in the present case such an application was to be implied. [D.C.]

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[9] For R.: *Ian McCulloch* (instructed by Messrs. Avery & Wolverson).

Commentary. *James* v. *Bowkett* was concerned with section 28 (1) of the Criminal Justice Act, 1948, where the wording was rather different. Counsel for the applicant argued, unsuccessfully, that this difference was material.

Letters to the Editor

Driving Licences—Epilepsy

Dear Sir,

Please forgive my comment that the suggested reply to my letter at [1958] Crim.L.R. 636 seems to add to the confusion. The provisions of section 5 (2) in its form as amended by the Road Traffic Act, 1956, are not in question, while your statement that it can hardly have been the intention that an applicant who truthfully admits that he is an epileptic should be in a worse position than one who untruthfully declares that he is not begs the question. Whatever may have been the intention, it is the wording of the section that has to be construed.

As to the right of appeal Lord Hanworth's judgment in *Hepworth's* case (based on the unamended wording of s. 5) refers to the situation where the refusal of the licensing authority " is plainly required under the terms of the statute " and to the applicant being " a person in respect of whose application the licensing authority have merely fulfilled the duty necessarily imposed upon them without question." Where the licensing authority have inquired into " other information " Lord Hanworth's reasoning does not apply. To take an extreme instance the medical reports which the licensing authority may have considered might refer to an entirely different person happening to have the same name. A more likely circumstance would be that the applicant would be able to produce other medical evidence to support his case. There can surely be no question but that in these circumstances he would be " aggrieved " and would have a right of appeal.

If it is possible for an epileptic to have a right of appeal to the justices it seems from subsection (5) that the justices have a discretion and are not absolutely barred from granting the appeal even if they find that the applicant suffers from epilepsy.

It may be that this ought not to be the law and that the section needs redrafting.

Yours faithfully,
J. H. C. PHELIPS,
Deputy Clerk of the County Council.

Worcester.

[Professor J. C. Smith writes: The amendment to section 5 (2) of the Road Traffic Act, 1930, which I overlooked when writing my reply to Mr. Phelips's letter, seems to me, with all respect, to make the matter quite clear by introducing, in express terms, the words (in effect) which

I suggested should be implied in the section in its original form. *Hepworth's* case decides that " where the refusal of the licensing authority is plainly required under the terms of the statute, and the case is not one within the proviso, it is not possible to hold that the applicant is a person aggrieved by the refusal. . . ." Unless I misunderstand him, Mr. Phelips admits that the licensing authority is now " plainly required under the terms of the statute " to refuse the licence not only where epilepsy is admitted, but also where the authority is satisfied on other information that the applicant is an epileptic. It seems to follow that an applicant who is proved to be an epileptic, whether by admission or other evidence, cannot be a person aggrieved.

Mr. Phelips's hypothetical cases, with respect, do not seem to me to be in point for they are cases where the applicant argues that the finding that he is suffering from epilepsy is wrong. They are on all fours with a case where the applicant says that his declaration did not amount to an admission. In such a case, if the court held that it was open to it to consider the question and decided that the declaration *was* an admission, that would surely conclude the matter; and a similar result must follow, I suggest, if the court decided that the finding that the applicant was an epileptic was right.

(*Re Aldborough's Application* (above, p. 691), however, holds that the finding of the licensing authority that the applicant is an epileptic is conclusive.)]

Acts and Orders *

Agriculture

AGRICULTURE ACT, 1958 (6 & 7 Eliz. 2, c. 71). This Act (which also makes changes in the law relating to agricultural tenancies) amends the law and increases the penalties in respect of offences relating to injurious weeds. The form of notice to be served on an occupier of land on which injurious weeds are growing is amended so that the notice now requires the occupier to take such action as may be necessary to prevent the weeds from spreading, and not, as hitherto, to cut down or destroy the weeds. The Schedule to the Corn Production Acts (Repeal Act) 1921 (11 & 12 Geo. 5, c. 48), is amended accordingly. The penalties for contravention are increased and an offender is now liable on summary conviction to a fine not exceeding £75 for a first offence and £150 for a second or subsequent offence. Proceedings may only be instituted by the Minister. If an occupier prevents or obstructs entry on his land which is made in accordance with the provisions of the Act the maximum penalty is increased from £20 to £50. These provisions of the Act came into operation on August 1, 1958, and apply to Scotland but not to Northern Ireland.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Animals

Special conditions must be observed before any pony is shipped by sea or by air from Great Britain to any place outside Europe. Such shipment is now prohibited unless, immediately before shipment, the pony has been inspected by a veterinary inspector and has been certified by him to be capable of being conveyed to its destination without unnecessary suffering. Operative August 18, 1958. EXPORTED PONIES PROTECTION ORDER, 1958 (S.I. No. 1271).

New provisions are made regulating the conditions under which horses may be carried by sea transport. The Horses (Sea Transport) Order, 1952 (S.I. No. 1291), is amended in three respects. It is now required that lighting in parts of a ship in which horses are carried shall be dimmed at night when not required at full strength, and it substitutes for the requirement that a ship carrying horses shall be provided with competent persons to ensure the proper watering, feeding and care of the horses, the requirement that for these purposes the owner of such a ship shall provide a competent person experienced in the handling of horses and, where necessary shall also provide a sufficient number of assistants. It is also required that all ships carrying horses below decks shall be provided with means of access to the animals in addition to the main hatchways. Operative August 18, 1958. HORSES (SEA TRANSPORT) AMENDMENT ORDER, 1958 (S.I. No. 1272).

For penalties for contraventions of both these orders see section 79 of the Diseases of Animals Act, 1950.

The Swine Fever (Infected Areas Restrictions) Order, 1956 (S.I. No. 1750), which placed restriction on the movement of swine in areas affected by swine fever, is amended. The principal amendments make provision for the selling of swine at a dispersal sale of livestock on premises within an affected area, and for the movement of swine in the course of transport by road between two places outside an infected area through an infected area. It is also provided that contravention or failure to comply with any condition attached to any licence issued under these Orders is an offence against the Diseases of Animals Act, 1950. Operative August 9, 1958. SWINE FEVER (INFECTED AREAS RESTRICTIONS) AMENDMENT ORDER, 1958 (S.I. No. 1284).

For penalties for contraventions see section 79 of the Diseases of Animals Act, 1950.

HORSE BREEDING ACT, 1958 (6 & 7 Eliz. 2, c. 43). Operative August 23, 1958. This Act consolidates the Horse Breeding Act, 1918 (8 & 9 Geo. 5, c. 13), and the Animals Act, 1948 (11 & 12

Geo. 6, c. 35). With the exception of section 15 (which relates to the New Forest) the Act applies to Scotland, but not to Northern Ireland. Section 17 (6) provides that where any offence for the continuance of which a penalty was provided under the previous Acts of 1918 or 1948 has been committed, proceedings may be taken under this Act in respect of the continuance of the offence in the same manner as if the offence had been committed under the corresponding provision of this Act.

For penalties for contraventions see sections 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 of the Act.

The Live Poultry (Movement Records) Order, 1954 (S.I. No. 122), is revoked and re-enacted with amendments, the principal of which is the introduction of a provision requiring persons carrying on the business of slaughtering poultry to keep a record of the poultry they slaughter. Operative September 1, 1958. LIVE POULTRY (MOVEMENT RECORDS) ORDER, 1958 (S.I. No. 1344).

For penalties for contraventions see section 79 of the Diseases of Animals Act, 1950.

SLAUGHTERHOUSES ACT, 1958 (6 & 7 Eliz. 2, c. 70). Operative August 1, 1958. Provision is made for the licensing and regulation of slaughterhouses and knackers' yards, for the operation of a new method of anaesthetising animals for slaughter and for the welfare of those employed in slaughterhouses. Slaughterhalls are to be isolated from dwellings (section 5), and it is an offence to cause or permit to be used as a dwelling any part of a building which contains a slaughterhall, unless this has been so used since before the passing of the Act.

For penalties for contraventions see section 106 of the Food and Drugs Act, 1955.

Children

CHILDREN ACT, 1958 (6 & 7 Eliz. 2, c. 68). This Act makes fresh provision for the protection of children living away from their parents and amends the law relating to the adoption of children. Part I (sections 1–17) provides for the supervision of foster children by local authorities, it replaces the child life protection provisions in the Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), the Public Health (London) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 50), the Children and Young Persons (Scotland) Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 37), and the Children Act, 1948 (11 & 12 Geo. 6, c. 43). Section 1 imposes a duty on local authorities to supervise the well-being of foster children. A foster child is a child below the upper limit of the compulsory school age whose care and maintenance are undertaken for reward for a period of more than one month by a person who is not a relative or guardian of his, but not a child whose well-being is already the responsibility of some competent authority (section 2). A person who proposes to keep a foster child must notify the local authority (section 3), which has power to inspect premises, impose conditions and prohibit the keeping of a child on unsuitable premises. Section 6 specifies certain disqualifications for maintaining a foster child. Foster children may be removed on the order of a juvenile court if the child is being kept in unsuitable surroundings, and in an emergency a justice of the peace may order such removal (section 7). A warrant authorising a search for and removal of a child may be issued if an authorised inspector is refused access to premises (section 8). Section 10 provides for sittings of juvenile courts under Part I of the Act; and section 11 gives a right of appeal therefrom to quarter sessions. Section 12 extends this part of the Act to certain school children during school holidays, and section 13 extends this part of the Act to certain children above the school leaving age. Section 14 provides that a person shall be guilty of an offence if he (a) fails to give any notice or information when required to do so under Part I of the Act, or knowingly makes or procures another person to make false or misleading statements in the notice or information; (b) refuses to allow visits to the child or inspection of the premises by an authorised officer; (c) fails to comply with the requirements of the local authority under this part of the Act; (d) maintains a foster child when disqualified from so doing under section 6 of the Act; (e) refuses to comply with an order for the removal of the child or obstructs the execution of any such order. A person guilty of an offence under section 14 is made liable on summary conviction to a fine not exceeding £100 or six months' imprisonment, or both. A local authority may institute proceedings under this section (section 14 (3)).

Part II (sections 18–36) amends the provisions of the Adoption Act, 1950 (14 Geo. 6, c. 26), by providing, *inter alia,* for an appeal to lie to the High Court for decisions of magistrates' courts (section 21); and any person who makes unauthorised arrangements for adoption is made liable on summary conviction to a fine not exceeding £100 or to six months' imprisonment or both (section 28). Section 31 provides for the return of infants placed by adoption societies and local authorities in certain circumstances, and contraventions of this section are made an offence the penalty for which is provided for by section 27 (5) of the Adoption Act, 1950. Section 33 restricts the removal of infants for adoption outside the British Islands, and section 34 prohibits payments made in consideration of adoption. Sections 33 and 34 provide that a person guilty of an offence under these sections shall be liable on summary conviction to a fine not exceeding £100 or to six months' imprisonment or to both.

Part III (sections 37–41) contains miscellaneous and general provisions, including a prohibition on anonymous advertisements offering to undertake the care of children. Contravention of this prohibition renders the offender liable on summary conviction to a fine not exceeding £100 or to six months' imprisonment or to both (section 37). The Act extends to Scotland, but not to Northern Ireland, and is operative April 1, 1959.

Civil Aviation

The fees chargeable under Schedule III of the Air Navigation Order, 1954 (S.I. No. 829), in respect of various matters are increased. Operative September 1, 1958. AIR NAVIGATION (NINTH AMENDMENT) ORDER, 1958 (S.I. No. 1251).

For penalties for contravention, see Article 67 of the Air Navigation Order, 1954.

Coal

OPENCAST COAL ACT, 1958 (6 & 7 Eliz. 2, c. 69). Operative September 30, 1958. Provision is made for the working of coal by opencast operations, including provision for the compulsory acquisition by the National Coal Board of certain rights over land. Section 39 provides for entry on land in connection with these matters, and any person who wilfully obstructs a person acting in the exercise of powers of entry conferred by this section is made liable on summary conviction to a fine not exceeding £20 (section 39 (8)). The Act applies to Scotland but not to Northern Ireland.

Companies

PREVENTION OF FRAUD (INVESTMENTS) ACT, 1958 (6 & 7 Eliz. 2, c. 45). Operative October 23, 1958. This Act consolidates the Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6, c. 16), the Companies Act, 1947 (10 & 11 Geo. 6, c. 47), s. 117, and so much of the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), as relates to those enactments. The Act extends to Scotland but not to Northern Ireland.

Penalties for contraventions are now provided for by section 1 (licensing of dealers in securities); section 6 (refusal or wilful neglect to attend tribunal of inquiry and offences relating to proceedings at such an inquiry); section 8 (information to be furnished to Board of Trade by holders of licences); section 10 (provisions as to industrial and provident societies); section 11 (building societies); section 13 (general provisions for prevention of fraud); section 14 (restriction on distribution of circulars relating to investments); section 18 (false statements in furnishing any information under the provisions of the Act); section 19 (offences by bodies corporate).

INSURANCE COMPANIES ACT, 1958 (6 & 7 Eliz. 2, c. 72). Operative November 1, 1958. This Act consolidates various existing enactments relating to insurance companies, with some minor amendments. The Act extends to Scotland, but not to Northern Ireland.

Penalties for contraventions are now provided for by sections 2, 26 and 27 of the Act.

Copyright

DRAMATIC AND MUSICAL PERFORMERS' PROTECTION ACT, 1958 (6 & 7 Eliz. 2, c. 44). Operative August 23, 1958. The provisions of the Dramatic and Musical Performers' Protection Act, 1925, and the Copyright Act, 1956, amending it, are consolidated.

Penalties for contraventions are now provided for by sections 1, 2, 3 and 4 of the Act.

Food and Drugs

Amending regulations provide for the sale and import of citrus fruit which contains diphenyl or ortho-phenylphenol or mixtures of these substances within prescribed limits. The Regulations of 1925 (S.R. & O. No. 775; (Scotland) S.R. & O. No. 814), as amended are further amended accordingly. PUBLIC HEALTH (PRESERVATIVES, ETC., IN FOOD) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 1319); operative August 14, 1958; (SCOTLAND) (S.I. No. 1329); operative August 16, 1958.

Landlord and Tenant

LANDLORD AND TENANT (TEMPORARY PROVISIONS) ACT, 1958 (6 & 7 Eliz. 2, c. 68). This Act is a transitional measure to restrict the recovery of possession by owners of certain decontrolled dwelling-houses. The owner is prohibited from obtaining possession of a dwelling-house to which the Act applies except by court proceedings; and he is also prohibited from withholding or withdrawing from the occupier, without reasonable cause, any services to which, or any furniture to the use of which, the occupier is for the time being entitled. The penalty for contravention of this prohibition is, on summary conviction, a fine not exceeding £100 or six months' imprisonment, or both (section 1).

The Act applies to Scotland (with certain special provisions) but not to Northern Ireland. It came into force on August 1, 1958.

Licensing (Liquor)

It is no longer necessary that the cheques by which shares of the compensation money are paid out shall have a form of receipt the signing of which is necessary in order to constitute a sufficient indorsement of the cheque. The Licensing Rules, 1910 (S.R. & O. No. 1180), as amended by the Licensing Rules, 1949 (S.I. No. 944), are further amended by substituting a new Rule 35 which no longer requires this special indorsement. Operative October 1, 1958. LICENSING RULES, 1958 (S.I. No. 1364).

London

METROPOLITAN POLICE ACT, 1839 (AMENDMENT) ACT, 1958 (6 & 7 Eliz. 2, c. 48). The maximum penalty for threatening, abusive or insulting words or behaviour in any thoroughfare or public place on conviction under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54, is raised to £10 on summary conviction and to £20 in case of a second or subsequent conviction (section 1).

The Act came into force on July 23, 1958, the date on which it received the Royal Assent.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1205 (St. Albans); 1248 (Camberwell); 1249 (Paddington).

The following Orders have been made prohibiting waiting: S.I. Nos. 1206 (Slough); 1223 (Harlow).

The following Order has been made regulating the maximum weight of vehicles which are permitted to use certain routes: S.I. No. 1207 (Hornchurch).

Magistrates

The following Order has been made altering petty sessional divisions: S.I. No. 1389 (East Riding of Yorkshire).

Medicine

MEDICAL ACT, 1956 (AMENDMENT) ACT, 1958 (6 & 7 Eliz. 2, c. 58). The Act of 1956 (4 & 5 Eliz. 2, c. 76) is amended with respect to the experience required for full registration and provisional registration.

For penalties for contraventions (for falsely pretending to be registered under the Act of 1956) see section 31 of the Medical Act, 1956.

Road Traffic

The Second Schedule to the Special Roads Act, 1949, specifies classes of traffic for the purposes of special roads. The composition of the classes of traffic respectively specified in that Schedule in Class I and II is now varied, by excluding from Class I motor-cycles with a cylinder capacity of less than 50 c.c. and vehicular agricultural machinery (Article 2); and by excluding from Class II vehicles used for the conveyance of abnormal indivisible loads, other than those constructed for naval, military, air force or other defence purposes (Article 3). The Order applies to England and Wales, and will cease to have effect on August 1, 1959. Operative August 5, 1958. SPECIAL ROADS (CLASSES OF TRAFFIC) ORDER, 1958 (S.I. No. 1280).

The speed limits which apply to specified classes and descriptions of vehicles on roads generally are not to apply on special roads. As respects vehicles driven on special roads it is provided that there shall be a speed limit in the case only of vehicles which are drawing trailers and are not articulated vehicles, and that this limit shall be 40 m.p.h. The provisions of the First Schedule to the Road Traffic Act, 1930, as varied by the Motor Vehicles (Variation of Speed Limit) Regulations, 1956 (S.I. 1957 No. 340) (which specifies speed limits for certain classes of vehicles on roads generally), are varied accordingly. The regulations will cease to have effect on August 1, 1959, and are operative August 5, 1958. MOTOR VEHICLES (SPEED LIMIT ON SPECIAL ROADS) REGULATIONS, 1958.

For penalties for contravention, see section 10 of the Road Traffic Act, 1930.

An additional type of helmet may be sold or hired to motor-cyclists within the provisions of section 42 of the Road Traffic Act, 1956. The Regulations of 1957 (S.I. No. 406), which prescribed the types of helmet which may be sold or hired without committing an offence under section 42, above, are amended accordingly. Operative August 25, 1958. MOTOR CYCLES (PROTECTIVE HELMETS) (AMENDMENT) REGULATIONS, 1958 (S.I. No. 1283).

For penalties for contravention, see section 42 of the Road Traffic Act, 1956.

Scotland

Paralytic and non-paralytic poliomyelitis must now be notified separately in Scotland. The Regulations of 1932 (S.R. & O. No. 1047) as amended, are further amended accordingly. Operative January 1, 1959. PUBLIC HEALTH (INFECTIOUS DISEASES) (SCOTLAND) AMENDMENT REGULATIONS, 1958.

For penalties for contraventions see section 1 of the Public Health (Scotland) Act, 1945.

The Importation of Plants (Scotland) Order, 1935 (S.I. No. 405), is amended by adding apples, apricots, greengages, nectarines, peaches, pears and plums, from certain European countries to the produce which must be accompanied by a health certificate. Operative August 7, 1958. IMPORTATION OF PLANTS (SCOTLAND) (AMENDMENT) ORDER, 1958 (S.I. No. 1275).

For penalties for contraventions see section 1 of the Destructive Insects Act, 1877.

Trade and Industry

TRADING REPRESENTATIONS (DISABLED PERSONS) ACT, 1958 (6 & 7 Eliz. 2, c. 49). This Act provides for the registration of persons who in the course of business sell or solicit orders for their goods by representations that disabled persons are in some way employed in the making or packaging of those goods, or that disabled persons in some way benefit from the sale of those goods or the carrying on of the business.

Section 1 (1) makes it an offence punishable by a fine not exceeding £100 or imprisonment for a term not exceeding three months, or both, in selling goods or soliciting orders for the sale of goods of any description in the course of visits from house to house or by post to make any representations that blind or otherwise disabled persons are employed in the production, preparation or packaging of the goods or benefit from their sale or the carrying on of the business unless the person carrying on the business is registered in respect of goods of that description. The section does not apply to businesses carried on by local authorities, certain charities, and non-profitmaking concerns, or by disabled persons themselves (section 1 (2)). The section will come into effect on January 1, 1959. Section 2 provides for registration, section 3 for appeal in case of a refusal to register. Section 4 is an interpretation section.

The Act extends to Scotland but not to Northern Ireland and came into force (save for section 1, above) on July 23, 1958.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

49. *Insurance—Use of combination with sidecar attached*

A man is the owner of a motor-cycle combination which is taxed and insured as such.

He takes off the passenger-carrying sidecar and uses the vehicle with just the chassis, *i.e.*, one wheel and two sidecar springs.

His Certificate of Insurance contains the following Limitation:

> "USE OF THE CYCLE IS ONLY PERMITTED WHEN A SIDECAR OR BOX CAR IS ATTACHED."

I contend that, used in its altered state, the machine is being used uninsured.

I have in mind a High Court decision of a few years ago, which I think related to this matter, and I would appreciate your views on this matter, quoting this case and any other authorities on the same subject, that you may know of. [H. R. D.]

ANSWER

The facts of this case are covered by the decision of the Divisional Court in *Bright* v. *Ashford* [1932] 2 K.B. 153. In that case a policy of insurance insuring the respondent against third party risks contained a condition that the insurers ". . . shall not be liable for any accident, loss or damage caused or sustained while any motor-cycle . . . is carrying a passenger unless a sidecar is attached." The respondent, who drove the motor-cycle on a road with a pillion passenger but without a sidecar being attached, was charged with the offence of using the vehicle without such a policy of insurance as complied with the requirements of the Road Traffic Act, 1930. The justices dismissed the case on the ground that the condition in the policy was of no effect by reason of section 38 of the Road Traffic Act, 1930, which states "Any condition in a policy . . . issued or given for the purposes of this Part of this Act [provision against third-party risks], providing that no liability shall arise under the policy . . . in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy . . . shall be of no effect . . ." The Divisional Court *held*, that section 38 did not apply to the case at all, since the condition in the policy in question circumscribed the operation of the policy from the very beginning. Therefore there was no policy in force where a passenger was being carried otherwise than in a sidecar.

In my opinion the same reasoning applies equally to the case now in question and accordingly the machine is being used uninsured. [M. D.]

Books and Periodicals

The Reluctant Cop. By Gerard Fairlie. London: Hodder and Stoughton. 1958. 187 and (index) 3 pp. (15s. net.)

It makes an interesting break in the apparently endless saga of Scotland Yard to have the latest C.I.D. story told by a reputed author instead of an anonymous hack, but one could have wished that the experiment had been a greater success.

Frankly, after reading Mr. Fairlie's story, you are left wondering whether it was worth the telling. This may be the fault of ex-Superintendent Webb and his innate modesty in telling his stories to his biographer or it may be the manner in which the latter has retold them. Whichever it is, the impression is left that all those superlatives which Mr. Fairlie heaps on his subject are hardly justified. A little luck, a little intuition (always a dangerous quality), one or two prisoners who gave themselves up and an admitted gift for the right approach in interrogation make up the Webb story.

Unfortunately, Mr. Webb appears to be a little less than grateful to the job that paid him, even if not generously, for thirty odd years. One can only be thankful that not all police officers react to their first arrest of a drunk in the manner in which he is alleged to have done, otherwise our streets would soon rival Hogarth's days. There is far too much emphasis by far placed on this ex-Superintendent's reluctance to be a police officer. It is a natural reaction to wonder why he stayed so long if he hated it so and how his conscience apparently permitted him to carry out only that part of his duties which suited him.

And oh dear!—the snobbery of that Metropolitan Police Training *College*! Is it not possible for any police officer to do his initial training at a school or must they all go to College straight away? We had always believed that since 1948 the latter was reserved for Sergeants and above.

Towards the end of this book, the central character is frequently reported as having " thinks," little ones, big ones and even quick ones. Perhaps he should have had another before he passed the proofs of this, his biography.

HUGH DUDLEY.

John Howard: Prison Reformer. By D. L. Howard. London: Christopher Johnson, 1958. 188 pp. including index (4 pp.). (18s. net.)

John Howard, who died in 1790, had during the last seventeen years of his life made himself famous for his work in connection with prisons. He was recognised in his life; but the prisons themselves were, at the time, little affected, as the author points out: " . . . when Elizabeth Fry first entered a prison in 1813, she found conditions different in no respect at all from those Howard had encountered " (p. 168). John Howard certainly had a remarkable gift for personally investigating most unpleasant social conditions, for example, his self-sought contact with the plague in Smyrna (p. 131). The author says " to be successful, he (the social reformer) must have an obsession with his cause " (p. 117). This book makes it clear that, though the conditions of British prisons were an obsession for Howard, after 1773 when he was appointed High Sheriff of Bedford, the sphere of his interest seemed to become ever wider. For example, he began with English and Scottish prisons, then absorbed himself in Continental prisons and died investigating hospitals and the plague.

There is probably little evidence available of the earlier activities and interests that may have absorbed this reformer, apart from his work as a benevolent landowner. The author inclines to the view that social esteem played a large part, at least during his earlier life. It is made quite clear, however, as indeed a reference to *The State of the Prisons* by John Howard abundantly shows, that personal discomfort and really shocking facts proved no deterrent.

This book raises many questions and, though the state of the prisons in 1777 may not be of great interest to many people today, the character of this extraordinary man, his feats of endurance, his method of investigation and the stirring of public opinion are matters of interest to everyone. Prison reform is a current topic and this book should stimulate at least curiosity and, may be, some more active interest in conditions today.

T. E. JAMES.

Policeman's Lot. By Harry Söderman. London: Longmans, Green & Co., Ltd. 1957. 368 pp. (18s. net.)

Harry Söderman, the Swedish criminologist, had a wide experience of police work in many countries. This volume is distinguished by a natural talent for story-telling and a professional faith in the importance of the science of criminology. The recital of crimes and the personal reminiscences are well done, in particular the accounts of the Glozel affair and of the birth of the International Police Commission. Occasional passages hold surprising comments: it is difficult, for example, to agree that justice is ever achieved by suicide, a judgment which ends the brief discussion of Colonel Redl.

The main interest lies, however, in the scattered passages in which the author traces the history of criminology and speculates on its future. The closing section, " Policeman's World," is particularly interesting in view of the current concern with criminology in this country. It is a pity that it is not longer: we could have done with more criminology and less crime.

C. D. L. C.

Books Received:

Murder with a Difference. By Molly Lefebure. London: Heinemann. 1958. 251 pp. (21s. net.)

Readers' Digest:

Appeal: Criminal Appeal Act, 1907: 226 *Law Times* 59.

False pretences: 226 *Law Times* 124.

Hire purchase: Offences in connection with deposits: 102 *Solicitors' Journal* 589.

Insanity: Legal madness: 66 *Police Review* 605.

Interpretation of statutes: An offence has been committed: 122 *Justice of the Peace* 496.

Road Traffic: Dangerous and careless driving: 66 *Police Review* 602.

Searches: Search without warrant: 66 *Police Review* 536.

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Books for review should be sent to the Publishers at the above address.

THE

CRIMINAL LAW REVIEW

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Editorial

"Race riots" in London

The words used by Mr. Justice Salmon[1] when he sentenced to four years' imprisonment nine youths convicted of various assaults and wounding offences on coloured men seem to us to be worthy of permanent record in this *Review*.

"You stand convicted on your own confessions of a series of extremely grave and brutal crimes. On the night of August 24 you nine men formed yourselves into a gang and set out on a cruel and vicious man hunt. You armed yourselves with iron bars and other weapons. Your quarry was any man, providing there were not more than two of them together, whose skin happened to be a different colour from your own. Your object was to instil stark terror and inflict as much pain and grievous injury as you could.

"During that night you savagely attacked five peaceful, law-abiding citizens without any shadow of an excuse. None of them had done you any harm. None of them had given you the slightest provocation. Indeed, you knew nothing about them, except that their skin happened to be of a colour of which you apparently did not approve. Two of them were lucky enough to escape before you were able to inflict other than comparatively minor injuries. The other three you left bleeding and senseless on the pavement.

"It was you men who started the whole of this violence in Notting Hill. You are a minute and insignificant section of the population who have brought shame upon the district in which you lived, and have filled the whole nation with horror, indignation, and disgust.

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[1] *The Times*, September 16, 1958.

"Everyone, irrespective of the colour of his skin, is entitled to walk through our streets in peace, with his head erect, and free from fear. That is a right which these courts will always unfailingly uphold.

"As far as the law is concerned you are entitled to think what you like, however foul your thoughts; to feel what you like, however brutal and debased your emotions; to say what you like providing you do not infringe the rights of others or imperil the Queen's peace, but once you translate your dark thoughts and brutal feelings into savage acts such as these the law will be swift to punish you, the guilty, and to protect your victims.

"I bear in mind what has been said on your behalf: you are young and have no previous convictions. Your victims, though grievously injured, after two or three weeks in hospital have sufficiently recovered to be allowed to return home and it is unlikely that they will suffer any permanent physical ill effects from your savage attacks. But for those facts I would have imposed much longer sentences. As it is I am determined that you and anyone anywhere who may be tempted to follow your example shall clearly understand that crimes such as this will not be tolerated in this country, but will inevitably meet in these courts with the stern punishment which they so justly deserve."

After-care and supervision of discharged prisoners

It is generally realised today that many criminals need something more than punishment, in its deterrent sense, to prevent them from committing further crimes and to turn them, for their own and everyone else's benefit, into useful members of the community. The Advisory Council on the Treatment of Offenders is, as its name implies, particularly concerned with this aspect of the criminal law. A committee set up by the Council has recently produced a report, which has been adopted by the Council, on the after-care and supervision of discharged prisoners.[2]

The committee's terms of reference were embodied in two questions which had been referred to the Advisory Council by the Home Secretary. They were to consider—

(a) whether any changes were necessary in the obligations of discharged prisoners to report their addresses for the information of the police, and

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[2] *The After-Care and Supervision of Discharged Prisoners*, H.M.S.O., 2s. 6d.

(b) whether there should be compulsory after-care after a sentence of imprisonment, to what categories of prisoner it should be applied, and by what sanction it should be enforced.

The committee held nine meetings and reached its conclusions after taking written and oral evidence from a number of interested bodies and after taking the answers of a sample 350 prisoners to a questionnaire.

After considering the present systems of compulsory and voluntary after-care, the committee recommended that the scheme should eventually be extended to include some 10,000 prisoners a year, instead of the present 1,335 a year, all of whom would receive after-care for twelve months. The first extension should be to the 2,000 or more prisoners who are released each year after serving their second sentence of imprisonment or after serving a sentence of four or more years. The extension of the scheme to other categories should, the committee recommend, await the results of a research project designed to measure the relationship between after-care and the prevention of crime.

Compulsory after-care should remain the responsibility of the Central After-Care Association working, as at present, through probation officer associates.

The committee recommend that the present system whereby released prisoners are, in certain cases, required to report their addresses for the information of the police, should be abolished, as it serves no practical purpose.

We sincerely hope that the recommendations of this committee are not doomed to lie forgotten on some dusty shelf in the Home Office, and that the Government will be able to see its way to implementing them by legislation. At a time when the problem of reforming the criminal rather than punishing him seems too often to be considered in terms of cloud cuckooland, the recommendations of this committee appear to us to be singularly in touch with the realities of life, and well thought out in consequence. The extensions of the present scheme as suggested take into consideration such relevant questions as the number of additional probation officers necessary to carry out the scheme and the number likely to be available within the next few years. Perhaps the best illustrations of the good sense of the committee are found in paras. 29–36 of the Report in which various schemes for selecting prisoners for after-care are considered. We cannot go into these in detail here; it is sufficient to say that the committee's reasons for rejecting a number of otherwise eminently worthy schemes seem to us to be based on an understanding of the vagaries of human nature usually absent from group recommendations.

The appointment of probation officers

We have been somewhat shocked to learn that the serious shortage of probation officers has led to a position being reached where officers may be appointed directly by probation committees, without experience or training, and that it is, in fact, possible to recruit probation officers through the medium of a local employment exchange without incurring the disapproval of the Home Office.[3]

At a time when more and more reliance is being placed on the skill and experience of probation officers in the work of reforming and reclaiming persons showing criminal tendencies we cannot but deplore this situation.

Probation officers are members of what is, or should be, a skilled profession. They are dealing, very often, with the problems of persons whose minds are younger or weaker than those of normal law-abiding citizens; with persons who are easily led, persons whose principal requirement is firm guidance; they are, in fact, handling that most delicate of fabrics, human personality. To commit such material to inexperienced and untrained hands may well be to undo work done by skilled officers. It will, in any case, weaken the respect for the profession which, by the high standards maintained by trained officers, has been built up in the past fifty years.

The Howard League for Penal Reform

The annual report of the Howard League for Penal Reform for the year ending June 30, 1958, shows how active the League has been in the past year in submitting evidence for the consideration of the Departmental Committees set up by the Home Secretary to consider various aspects of penal reform.

One of the problems considered was that of conditions of service of prison staff. The Howard League recommends that prison officers should be given more responsibility and a more comprehensive training: "If personal responsibility is to be encouraged among prisoners, it must even more be encouraged among those who have to set them an example."

The delays in the promotion of a uniformed prison officer cause some concern and the strict discipline which governs the attitude of the ordinary prison officer to his superiors are felt by the League to be out of date, now that the emphasis in the treatment of criminals has moved from repression to rehabilitation.

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[3] See *Probation*, Vol. 8, No. 11, pp. 163, 165.

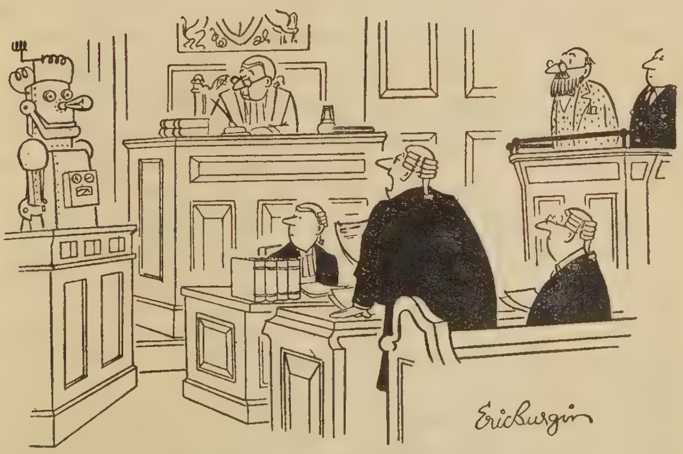
The Howard League also recommend some decentralisation of the prison system. At present comparatively trivial inquiries sometimes take months to settle, and it is suggested that such delays would be less likely to occur if the 70 institutions under the control of the Prison Commissioners could be grouped in sections, each responsible to an area office having sufficient powers to make independent decisions within the framework of general policy.

The League also made recommendations to the Ingleby Committee on the law relating to children and young persons. They recommend that the age of criminal responsibility should be raised to 14, that children below that age should be dealt with by non-criminal children's courts; and that adolescents between the ages of 14 and 18 should be dealt with by youth courts created for the purpose. They also suggest that the Approved School system should be merged into the system of special schools under the Ministry of Education.

Judicial appointments

Mr. Justice Willmer has been appointed a Lord Justice of Appeal.

Gerald Alfred Thesiger, Esq., Q.C., and Joseph Bushby Hewson, Esq., Q.C., have been appointed judges of the High Court.



"How long have you known the accused?"

With Malice Aforethought: R. v. Vickers Reconsidered [*]

The judgment of the Court of Criminal Appeal in the case of *R.* v. *Vickers* [1] was severely criticised by Mr. J. W. Cecil Turner in an article which was published in the January issue of this *Review*.[2] The object of this article is to demonstrate that Mr. Turner's reasoning is based on misconceptions which render his conclusions wholly untenable.

R. v. *Vickers summarised*

Vickers, it will be recalled, was convicted of murder after the jury had been directed that the intent to do grievous bodily harm constitutes sufficient malice aforethought to sustain a conviction for murder. In the Court of Criminal Appeal it was submitted on his behalf that, although this direction would have been unimpeachable before the enactment of the Homicide Act, 1957, it had been rendered obsolete by section 1 (1) of that Act, which provides that:

> " where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

It was argued that, where death results from acts done with the intent to cause grievous bodily harm, the assailant kills in the course of some other offence (*viz*., causing grievous bodily harm contrary to section 18 of the Offences against the Person Act, 1861) and that the jury should, therefore, have been directed to convict only if there was the malice required for a killing to amount to murder when it is not done in the course of that offence, *i.e.*, if there was either an actual intent to kill or foresight that death would result from his acts.[3] To put it in another way, the appellant's contention was that, before the enactment of the Homicide Act, the intent to cause grievous bodily harm constituted, not the implied malice which is inferred from the intent to harm, but the constructive malice which is inferred from the fact that causing grievous bodily harm is a felony; and that it had, therefore, been abolished by section 1 (1) of the Act.[4]

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[*] The author of this article regrets that he is compelled to remain anonymous. Mr. J. W. C. Turner has, however, been informed of the views expressed in this article.

[1] [1957] 2 Q.B. 664.

[2] " Malice Implied and Constructive ": [1958] Crim.L.R. 15. The article was expressed to be based on a section in the then forthcoming 11th edition of Russell on *Crime* and the substance of it has now appeared in that work at pp. 557–560 and 571–574. The conclusions are repeated in the 17th edition of Kenny's *Outlines of Criminal Law* (which is, of course, also edited by Mr. Turner) at pp. 140, 152–154 and 173.

The Court of Criminal Appeal rejected this argument and dismissed the appeal. In his article Mr. Turner restates the argument and criticises the grounds on which the court rejected it. Both his own interpretation of the section and his criticisms of the court's judgment will now be examined in detail. The following four propositions state his case on the construction of the subsection in his own words.

> (i) Supposing . . . , upon a charge of murder, that the jury are not satisfied that the prisoner intended to kill but are satisfied that he did intend to do grievous bodily harm, that would be a finding that he had caused the death " in the course or furtherance of another offence."
>
> (ii) It would be an illogical absurdity to accept an intent to cause grievous bodily harm as " implied malice," and therefore to read the statute as tantamount to stating " to kill with the intent to cause grievous bodily harm will be murder if the deceased was killed with intent to cause grievous bodily harm."
>
> (iii) Therefore, in order to make sense of section 1 (1) it would seem that some other meaning than " intent to cause grievous bodily harm " must be found for " malice aforethought . . . implied."
>
> (iv) The only sensible interpretation of the section is to read the words as meaning that [the accused] consciously took the risk of killing [the victim].[5]

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[3] No other misdirection was alleged and it is, therefore, a little difficult to follow the complaint made by Mr. J. E. Hall Williams in his note on the case at 20 *Modern Law Review* 634 that " the second argument advanced by counsel for Vickers is not really answered by the judgment." The " second " argument considered by Mr. Hall Williams was, in fact, not advanced by counsel: see note 23, *infra*.

[4] The marginal note to the section reads " Abolition of constructive malice ": it will be appreciated that the note does not form part of the statute, " but may be looked at as some indication of its purpose ": *R.* v. *Vickers* [1957] 2 Q.B. 664 at p. 669. This article adopts the meanings of the terms " implied malice " and " constructive malice " which were employed by the Court of Criminal Appeal in *R.* v. *Vickers*.

[5] [1958] Crim.L.R. 15 at pp. 18–19. In the Court of Criminal Appeal counsel sought to establish, by reference to the history of the law of murder, that the intent to do grievous bodily harm has always been treated as malice

"Some other offence"

The foundation of Mr. Turner's argument is, then, the proposition that, in the context of the Homicide Act, a person can properly be said to have killed in the course or furtherance of causing grievous bodily harm with intent. This proposition literally does not make sense. Section 1 (1) of the Act applies only "where a person kills another in the course or furtherance of some other offence." A reference to a person who kills in the course of *some other* offence must mean that the killing is unlawful: if it were not unlawful, the reference would be to a person who kills in the course of *some* offence. The subsection therefore postulates an unlawful killing and applies only if the accused committed it in the course or furtherance of "some other offence," *i.e.*, some offence other than the unlawful killing.[6] The acts which resulted in death and thereby constituted the unlawful killing will, of course, amount to one or more of a number of other offences, such as causing grievous bodily harm, unlawful wounding, aggravated assault and so on. But the unlawful killing constitutes either murder or manslaughter and it is a mere abuse of language to say that a person commits murder or manslaughter *in the course or furtherance of* inflicting grievous bodily harm, unlawful wounding or aggravated assault: one might as well refer to a person committing manslaughter in the course or furtherance of causing death by dangerous driving, or causing death by dangerous driving in the course or furtherance of dangerous driving. The words "in the course or furtherance of" are plainly inapt with the result that in the context of the Homicide Act it simply does not make sense to say that a person has killed in the course or furtherance of causing grievous bodily harm. The legal implications in that context of a death resulting from acts done with intent to cause grievous bodily harm were, it is suggested, correctly set out in the passage from the article "Appeals to the House of Lords" which Mr. Turner cites with disapproval: "causing grievous bodily harm is not in these circumstances 'some other' offence than the killing; it is part of the killing."[7] This is obviously right: the ingredients of

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aforethought because (and only because) it is a felony to cause grievous bodily harm with intent, *i.e.*, that it is constructive malice and therefore (as it were) within the mischief at which the section is directed.

[6] And not merely (as Mr. Turner assumes) some other offence than murder, a construction which does violence to the plain language of the statute.

[7] [1958] Crim.L.R. 566 at p. 575, where the observation was attributed to Slade J. In his article, Mr. Turner dismisses it as "a simple *petitio principii*," points out that no reference to it could be found in any of the reports, and comments "without knowledge of its context, therefore, it would be improper to attribute to the learned judge the illogicality which

the killing are the infliction of grievous bodily harm with intent and the fact that the victim died from it.

The court's interpretation

The first of Mr. Turner's four propositions must, therefore, be rejected and, its foundation having gone, his argument falls to the ground.[8] It is now necessary to consider whether there is any substance in his criticisms of the interpretation adopted by the Court of Criminal Appeal. The general purport of the court's interpretation can be conveniently expressed in the language used by the then Home Secretary in explaining the section to the House of Commons:

> "Its effect is that a killing in the course of a felony, resisting an officer of justice, avoiding or escaping from legal custody or from arrest will not be murder unless it is done with intent to kill, or to do grievous bodily harm; in other words, unless it is murder in its own right so to speak, irrespective of the fact that it is done in the course of a felony or other offence to which I have referred."[9] ✓

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is apparent from the context in which the author of the article employs it." The context of the remark is s. 1 (1) of the Homicide Act, 1957, and in that context it is plainly valid. The illogicality is Mr. Turner's.

According to the transcript of the shorthand note of the second hearing, the following observations were made by Slade J. in the course of the argument:

"Will you help me? The first line and a half reads: 'Where a person kills another in the course or furtherance of some other offence . . .' The expression 'other offence' postulates an offence which does not come within the term 'other offence'? . . . What is that offence, the killing? . . . Therefore, is it not referring to an offence other than the course of conduct which produces the killing? Causing grievous bodily harm with intent is part of the course of conduct which produces the killing."

[8] The fallacy underlying Mr. Turner's argument is, as becomes clear from his criticism of the court's judgment, the assumption that, in s. 1 (1) of the Homicide Act, the word "killing" "only indicates the *actus reus* of the offence of murder." This error, which is directly due to his failure to relate the word "kills" to its context in the subsection, leads him to construe the opening words of the subsection as if they read "Where a person kills another in the course or furtherance of some other offence than murder." They cannot, of course, be made to bear that construction; and any argument based on it must, therefore, be rejected. The analysis in the text of this article also answers the question, posed by Mr. Turner, why the words "some other offence" apply to only *some* other offences: [1958] Crim.L.R. 15 at p. 26.

[9] 560 H.C.Deb. 1153. Mr. Turner complains that nothing comprehensible was stated about the distinction between implied and constructive malice in the course of the parliamentary debates. In the passage quoted above the Home Secretary defines the forms of malice abolished by the section and the forms preserved by it; according to the marginal note the section abolishes constructive malice and it preserves implied malice in terms. There was certainly no doubt about the Government's intentions in either House of Parliament and it is difficult to see what further explanation can reasonably be demanded.

The intent to do grievous bodily harm

The statement that a killing done with intent to do grievous bodily harm is "murder in its own right" found its judicial form in the decision that the intent to do grievous bodily harm constitutes implied malice aforethought and it is at this decision that Mr. Turner's initial attack is directed. The judgment, after defining constructive malice in the terms adopted in this article, continues:

> "If a person does an act which amounts to the infliction of grievous bodily harm he cannot say that he only intended to cause a certain degree of harm. It is called *malum in se* in the old cases and he must take the consequences. If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, and was at the time this Act was passed, sufficient to imply the malice aforethought which is a necessary constituent of murder." [10]

Mr. Turner criticises the passage on two grounds. In the first place, he construes the first two sentences as meaning that, if the accused in fact inflicts grievous bodily harm and his victim dies, "the prisoner is legally held to have intended grievous bodily harm" and "cannot escape conviction of murder on the argument that he only intended to cause a less degree of harm" [11]; and he concludes that "the law of murder has now been made more severe than in effect it was before the new Act." A little reflection, and reference to the authorities which were cited to the Court of Criminal Appeal, will be enough to show that this is a complete misunderstanding of the court's judgment. The first two sentences mean only that, if death results from the infliction of grievous bodily harm, the accused cannot in any event be acquitted, but will be guilty of murder or manslaughter according to the intent with which he acted [13]; while the third points out that if his intent was to inflict grievous bodily harm he will be guilty of murder: all of which is trite law indeed and does not, of course, lead to the alarming consequences predicted by Mr. Turner.[14]

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[10] [1957] 2 Q.B. 664 at p. 670.

[11] Kenny's *Outlines of Criminal Law* (17th ed.), p. 153, and see also p. 173; [1958] Crim.L.R. 15 at p. 24 and pp. 28–29; Russell on *Crime* (11th ed.), p. 572.

[13] These sentences are a paraphrase of a passage in Foster's *Discourses*, p. 259, which was cited in argument by the appellant's counsel. Mr. Turner cites a passage to the same effect in East 1 P.C., Chap. V, s. 31, apparently under the impression that it demonstrates the fallacy in the reasoning of the Court of Criminal Appeal.

[14] There appears to be equally little ground for Mr. Turner's conclusion that "it may be expected that the effect of the Act, as it seems to have been

6 In the second place, he points out that it "is not, in terms, correct so far as the ancient writers are concerned"[15] to say that the intent to inflict grievous bodily harm has always been held sufficient to imply malice aforethought. This comment is literally true, in that the ancient writers do not, in terms, refer to grievous bodily harm at all; but it may mislead the unwary reader into thinking that they did not regard the intent to inflict it as sufficient to imply malice aforethought. On the contrary, it is clear from Stephen's *History of the Common Law* (which Mr. Turner cites as the authority for his criticism) that they regarded it as more than enough; and there can be no doubt whatever that throughout English history a killing done with that intent has amounted to murder.

After dealing with the law in force before the Homicide Act was passed, the court turned to the construction of section 1 of the Act and the judgment continued as follows:

> "It will be observed that the section preserves implied malice as well as express malice, and the words "where a person kills another in the course or furtherance of some other offence" cannot, in our opinion, be referred to the infliction of the grievous bodily harm if the case which is made against the accused is that he killed a person by having assaulted the person with intent to do grievous bodily harm, and from the bodily harm he inflicted that person dies. The "furtherance of some other offence" must refer to the offence he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it. It was always the English law, as I have said, that if death was caused by a person in the course of committing a felony involving violence that was murder. Therefore, in the present case it is perfectly clear that the words "where a person kills another in the

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interpreted in *R.* v. *Vickers*, will be to render the exercise by the Home Secretary of his discretionary power to invoke the prerogative of mercy rarer than heretofore." It is a little difficult to see why an increase in the number of opportunities for invoking the prerogative should lead to a diminution in its exercise; and the only clue Mr. Turner gives to his meaning is in a footnote, the substance of which also appears in Russell and Kenny, which refers to the parliamentary debates and reads "this [result], indeed, seems to have been envisaged." This is more than a little disingenuous: what was envisaged, of course, was that the prerogative would be exercised more rarely after the enactment of the Homicide Act simply because, as a result of its provisions, fewer sentences of death would be passed, not (as Mr. Turner's footnote implies) because a smaller proportion of them would be commuted.

[15] [1958] Crim.L.R. 15 at p. 25, where something seems to have gone wrong with the text of Mr. Turner's article.

> course or furtherance of some other offence" must be attributed to the burglary he was committing."[16]

Mr. Turner criticises this passage on four grounds, which can be put quite shortly: first, that the two opening sentences constitute "a categorical statement not based on any argument"[17]; second, that the court failed to detect the ambiguity in the word "killing," which is "not *per se* an offence at all," but a mere physical act, so that the mental element constituting malice must be sought elsewhere[18]; third, that the fourth and last sentence is a *non sequitur* because it does not follow from the third[19]; and fourth, that neither in this passage nor in the ensuing sentences (which it is not thought necessary to quote in full) is "any justification advanced for regarding the felonious assault described as not being another offence than murder."[20]

Mr. Turner's criticisms refuted

None of these criticisms has any validity. The answers to them, which are equally short, are respectively: first, so far from failing to give reasons for its interpretation of section 1 (1) of the Homicide Act, the court expressly based its judgment on the ground that any other interpretation would make nonsense of it[21]; second, as has already been shown, in the context of subsection (1) the word "killing" must mean an unlawful killing (which implies *mens rea*) and there is therefore no ambiguity in its use; third, the last sentence in the passage plainly follows from the second, the third being no more than an explanatory interpolation which is not intended to carry the argument any further[22]; and finally, the court held, not that an offence against section 18 of the Offences against the Person Act is not another offence than murder (which would be preposterous), but that it is not in the present context another offence than killing—a very different matter.

The nature of the misconceptions on which Mr. Turner's reasoning is based will by now have become apparent. In particular, his criticism of the judgment contains a crucial misunderstanding of the passage dealing with the legal consequences of a death resulting from the infliction of grievous bodily harm:

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[16] [1957] 2 Q.B. 664 at pp. 670–671.
[17] [1958] Crim.L.R. 15 at p. 25.
[18] [1958] Crim.L.R. 15 at pp. 25–26.
[19] [1958] Crim.L.R. 15 at p. 26.
[20] [1958] Crim.L.R. 15 at p. 27; and see also p. 26.
[21] [1957] 2 Q.B. 664 at p. 671: "otherwise there would be no sense in it."
[22] In Mr. Turner's examination of the passage a page of comment separates the first two sentences from the last two; this seems to be the reason for his failure to relate the fourth sentence to the second.

and his own interpretation of the Homicide Act is vitiated by his failure to draw the necessary inferences from the reference in the section to " some other offence." His construction of it is in consequence plainly untenable; and there is no reason for impugning the decision of the Court of Criminal Appeal that the legislature achieved the precise object which was intended: namely, that, where a person kills unlawfully in the course or furtherance of committing some offence distinct from the killing, then, in determining whether the killing amounts to murder, that other offence must be ignored.[23]

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[23] The argument based on the Homicide Act having been rejected, no question arose of the court rejecting the concept of implied malice in favour of the test of recklessness so familiar to readers of Russell and Kenny; but see " Murder and the Reasonable Man," by Group Captain J. T. Lowe: [1958] Crim.L.R. 289–298, 374–382 and 453–465.

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

Wandering Abroad

"This is the case you put back for an interpreter, your worship," said P.C. Mure, the assistant gaoler, as he helped what looked like an untidy bundle of old clothes to hoist itself into the dock.

"Oh yes, I remember; the case of . . ." said Mr. Sutterthwick, turning back in his register. "The man with the unpronounceable name," he concluded, as he found the entry.

"Yes, your worship," said Mure feelingly. When he had first brought the prisoner in he had done his best with some most unlikely looking conjunctions of consonants unleavened by any vowels, and the result had been giggles from the back of the court.

"How long did you say he has been in this country?" asked the magistrate.

"Eleven years, your worship," said Mure.

"And he still doesn't understand English!"

"He seems to forget it when he comes into court, your worship. He speaks and understands it all right outside."

"Evidently Mr. Frell and I don't talk to him in the right way," said Mr. Sutterthwick. "Let the interpreter be sworn."

The interpreter is sworn

A short, stocky man with a bald head, drooping moustache and pointed beard, came into the witness-box and was asked by Sergeant Quing, the warrant officer, "What religion are you, sir?"

The question seemed to perplex the interpreter considerably; after an interval of reflection he said: "I am not quite sure."

"Well, are you a Christian?" said Sergeant Quing encouragingly.

"As a matter of fact I have had doubts lately. I have been thinking it over, and I haven't really made up my mind yet."

"He'd better affirm," said Mr. Sutterthwick, a trifle impatiently.

"He can't affirm, sir, unless either he has no religious belief or taking an oath is contrary to his religion," said the clerk.

"The law doesn't seem to have made provision for his state of mind, Mr. Frell," said the magistrate.

" Will an oath on the New Testament be binding on your conscience? " said Frell to the interpreter.

" Of course. I am an honourable man," was the reply, spoken with some resentment.

" I think he should take the ordinary oath, sir," said the clerk to the magistrate. " It obviously isn't against his religious belief, and he hasn't said that he has no religious belief; only that he has doubts."

" Very well, let him be sworn—as I said to begin with," said Mr. Sutterthwick.

The interpreter duly engaged himself to interpret well and truly to the best of his skill and ability all such matters as were demanded of him. He was then told by Frell to " go and stand beside the defendant," but, in view of the condition of the man in the dock, this instruction was not taken too literally.

" Let the officer who made the arrest be sworn," said the clerk.

Pleading to a charge of vagrancy

" Aren't you going to put the plea to the defendant, Mr. Frell? " inquired Mr. Sutterthwick.

" I don't think it can be done straightaway, sir. The Vagrancy Act, 1935, added a proviso to section 4 of the old Act of 1824, the effect of which was that a person wandering abroad without a home shall not be deemed a rogue and vagabond unless one of three things is proved. In this case, the charge sheet shows that it's a failure to go to a place of shelter that the police are setting out to prove."

" Can't that be proved by an admission from the defendant? "

" That doesn't appear to have been the intention of the amending Act, judging by its wording, sir. And then there's also a difficulty over the ' not giving a good account of himself ' part of the offence. If that means giving an account of himself to the court, then asking him to plead to the charge would, in effect, be asking him whether he admits failing to do something he hasn't had an opportunity to do."

" I suppose it will be quicker if you do it your way, Mr. Frell," said the magistrate resignedly.

Police evidence

A police constable who, during these low-voiced exchanges, had been hovering uncertainly in the background was called into the witness-box and became again a man who knew exactly what was required of him. Getting swiftly through the introductory ceremonies of taking the oath and giving his name and number, he proceeded at the regulation pace with his testimony. But the interpreter had to be allowed time to perform his office, and the clerk soon had to indicate to the officer that something less than note-taking speed was required. The pauses which ensued were, in the early stages of the evidence, inordinately prolonged because the accused insisted on making to the interpreter what were obviously vehement protests at each sentence translated. It needed several protests from the clerk to goad the interpreter into becoming vehement enough himself to curb the eloquence of his compatriot. But it was clear that the prisoner was not really convinced that an effective defence was possible under the English system of refusing to hear both sides at once.

The constable's account of the matter was that at 12.17 a.m. he had found the accused asleep in a bus shelter. When roused and asked where he was going, the accused had said " Nowhere." When asked where he lived, he had said " Anywhere." When told he could not spend the night where he was, he had replied: " Why not? "

" Were the buses still running? " asked Mr. Sutterthwick, to make certain that no arbitrary police action had been taken.

" No, your worship. The last bus went at 11.42," was the reply.

" Continue with your evidence," said the magistrate.

" I directed him to a place of shelter, your worship, and he said: ' I'm not going there. I've been there before.' I repeated my request three times and warned him I should have to arrest him if he refused. As he still refused I arrested and cautioned him. He replied: ' You can do what you like.' "

" What was the place of shelter you directed him to? " asked the clerk.

" Montmorency Manor, your worship."

" That's what they used to call ' The Workhouse ' once upon a time, isn't it? " said Mr. Sutterthwick ; the officer agreed that it was.

" It's three miles from where he was arrested. How was he to get there if the buses had finished running? " asked Frell, having in mind that the Act required the " place of shelter " in such cases to be " reasonably accessible."

" He could have taken a taxi if he had been willing to go, your worship."

It was not often that the magistrate and clerk were both surprised by something said in court, but this was one of those rare occasions. The constable savoured for a moment the sensation he had created, and then explained: " The prisoner had £23 7s. 8d. on him when he was searched at the police station, your worship."

" He could have gone to a hotel, then," said Mr. Sutterthwick, but immediately added, after another look at the figure in the dock, " No, perhaps he couldn't have done that with any hope of being taken in."

" In the old days this would have prevented him being charged, wouldn't it? " he remarked to Frell.

" Yes, sir. It was the amending Act of 1935 which repealed the ' without visible means of subsistence ' part of the section."

" You can't sleep out nowadays even if you are a millionaire then? "

" Not unless you can give a good account of yourself."

" What does that involve, Mr. Frell? "

" I don't know, sir. There's no High Court decision to say. Magistrates have to decide that themselves."

Mr. Sutterthwick turned to the constable and said: " Does that complete your evidence? "

" Later, when formally charged and cautioned at the police station, the prisoner made no reply," said the officer, conscientiously rounding off the record from a police point of view.

The defendant speaks

" Ask him, Mr. Interpreter, if he wants to put any questions to the witness through you," said the clerk.

There followed a long conversation between the accused and the interpreter, which Mr. Sutterthwick finally interrupted by saying: " Well, you should have enough material now to ask the first question, Mr. Interpreter."

" He isn't really asking questions, sir. He's telling me about himself."

" Tell him that will come later. Now is the time for questions to the officer, if he wants to ask any."

Another earnest conference took place between the accused and the interpreter, and this also was brought to an end by the bench.

" What's his question? " asked Mr. Sutterthwick, somewhat impatiently.

The interpreter considered for a moment and then said: " He hasn't any questions to ask the policeman."

" It took a lot of words to tell you that," said the magistrate.

" He spent much time in saying that what the policeman tells is not the truth," said the interpreter in the apologetic manner of one who is the unwilling bearer of an insulting message.

" Perhaps you'd better ask him whether he wants to give his account of what happened, and, if so, does he want to give it on oath? " said Mr. Sutterthwick. This time he did not allow the dock-side discussion to go on long before intervening with " What does he say? "

The interpreter cogitated again and said: " He says he is not an animal and does not want to live like this, and the policeman woke him up very rudely."

" Ask him if he wants to say anything about what happened after the policeman woke him up."

The debate which ensued on this became almost fierce, but finally the interpreter said: " No. He doesn't want to say anything more, except that it is not his fault that he has no home, and he was only waiting for a bus."

" Ask him whether he has any witness to call." The answer to this came almost immediately. " He says God is his only witness," announced the interpreter.

" Tell him I find the case proved," said the magistrate, and added, turning to Inspector Campting: " What is known about him? "

Case history

The inspector opened a folder and said: " He is 42 years of age, your worship, and is, so far as we know, a single man. He has been in this country since 1948 and has one previous conviction, two years ago, when he was sentenced to one day for begging. He doesn't appear to have done any regular work for a number of years and is, at present, drawing National Assistance benefit."

" Has this country got to keep him for the rest of his life? Can't he be deported? " asked the magistrate.

" I'm afraid not, your worship. I believe there are political difficulties," said Inspector Campting discreetly.

" How did he get here in the first place, then? "

" Apparently, your worship, he left his home originally to escape the Russians, and he was then captured by the Germans and sent to forced labour. After the war he wandered about Germany for some time and was eventually placed in a displaced persons' camp. From there he came to England to do agricultural work."

" Did he do any? "

" He worked on a farm for about a year, your worship. Then he took a job in a factory, but was discharged from that as unsuitable, and he only seems to have done casual work since. He wanders about the country."

" It's a dismal story," said Mr. Sutterthwick. Turning to the probation officer, he asked: " Is there anything you can do in this case? "

Thorburton got up and said: " I don't know this man personally, sir, but I have had a report about him from my colleague at the court which convicted him of begging. A prison doctor examined him during a remand on that occasion, and the report was that the accused was a social and not a medical problem. Whether it's a result of his experiences or whether he was always this way inclined I can't say, of course, but I don't think he wants now to work and lead a normal life."

" But he must be very uncomfortable—and very cold, too, this weather," said the magistrate.

" The police tell me he is wearing three pairs of trousers and four coats, sir."

" What about the money on him? How does he come to have over £20? "

" He probably lives very, very cheaply on left-over food from cafés and help from charitable organisations, coupled with a bit of begging, so he's probably able to save out of his National Assistance money, sir."

" He must think he's living in Wonderland," commented Mr. Sutterthwick. To the interpreter he said: " Ask him if what I've heard about him is true."

This time the accused spoke very tersely indeed. " He says the money he has he earned by working for it," explained the interpreter.

" Ask him whether he has anything else to say to me."

This was duly interpreted but the occupant of the dock seemed to have lost interest in the proceedings, and the interpreter only proclaimed the obvious when he stated that the defendant had nothing more to say.

Sentence

" I don't really know what's best to be done in this case—or whether any ' best ' is possible," said Mr. Sutterthwick. " But it seems to me there is just a chance that the defendant may be deterred from this way of life if he loses money by it. That might also encourage him to do some work to replace his loss. Tell him I shall fine him £5. That means the country will get back a little of the money it has spent on him."

" The interpreter's fee is one guinea," put in Frell.

" And the defendant must pay a guinea costs as well," concluded Mr. Sutterthwick.

Before the interpreter could begin to put this into the accused's native language there was a frenzied outburst from the dock. After some moments the magistrate interrupted with: " What is all that about? " The interpreter looked extremely embarrassed and said, rather timidly, " I hardly like to say, sir."

" Very abusive, is it? "

" I'm afraid so, sir."

" I have no more any faith in English justice," shouted the defendant, evidently having lost faith in interpreters also.

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A. E. Jones
1958

Corroboration of the Evidence of a Co-prisoner

By P. C. Hubbard

Given the rule as to corroboration of the evidence of accomplices it is submitted that there can logically be no doubt that it applies to the evidence of all witnesses, in whatever capacity they enter the witness-box, who are in fact accomplices, either confessedly, by previous conviction, or subsequently so shown to be by the verdict of the jury in the trial at which they give the evidence. In the last case the customary warning to the jury will be hypothetical: the witnesses, at the time the judge sums up, will be merely " suggested accomplices," to use the expression employed by Shearman J. in *Frederick Dean*.[1] In *Barnes and Richards*,[2] however, the wording of the head-note would appear to lay down a different proposition—a proposition which was copied verbatim in Archbold.[3] This reads as follows: " Where prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case. The rule applies only to witnesses for the prosecution." This, without qualification, it is submitted with respect, is a misleading statement as to the effect of *Barnes and*

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[1] (1924) 18 Cr.App.R. 21, 24.
[2] (1940) 27 Cr.App.R. 154.
[3] 33rd ed., p. 482.

Richards, since it suggests that a witness who would otherwise be deemed an accomplice for the purpose of the rule as to corroboration is not in law an accomplice if he is a co-prisoner. It is true that the legal position has now been put beyond doubt by *Rudd*,[4] but curiously enough the head-note to this case, while it notices other points decided, makes no mention of corroboration, although lack of a direction as to corroboration was made a distinct ground of appeal, and this ground of appeal was expressly dealt with in the judgment of the court. This part of the decision in *Rudd* is clearly set out in Archbold.[5] It is thought that it may be helpful to review the legal position and examine some of the cases which have dealt with the point under consideration.

Martin's case

In *Martin* [6] the court declined to make any express ruling on the point. Lord Alverstone C.J. said: " This is one of those cases where it is very difficult to apply the rule about accomplices. . . . The case was essentially one for the jury, and there was no want of direction which could have led to any miscarriage of justice." The facts appear to have been that the appellant and one Johnson, who lived at the same lodging-house, were convicted of stealing a parcel of food. The lodging-house keeper testified that it was Johnson who brought the parcel home, although the appellant had some of its contents. Johnson implicated the appellant by saying: " I met Martin out, and he asked me to carry it into the house." The appellant, on hearing of this statement, did not contradict it and said: " I have nothing to say." It is submitted, with respect, that the rule about accomplices, which is a rule for the guidance of juries, should be applied even though its application may be difficult. The jury, it is submitted, should have been told: " If you are relying on Johnson's evidence to convict Martin, it will not be safe to do so unless you find that Johnson's evidence is corroborated." But on the facts given in the report it would appear that the reason why the absence of a direction did not lead to any miscarriage of justice was that the jury did not believe and did not rely on Johnson's statement: " I met Martin out, and he asked me to carry it into the house." As Lord Alverstone said: " If Johnson's story was true he was not an accomplice." From their conviction of Johnson it is clear that the jury did not believe his statement, and although they therefore found him to be an accomplice, nevertheless, since this statement, which they did not accept, was the only statement by Johnson implicating the appellant of which appellant's counsel complained, it follows that the jury did not rely on the evidence of the accomplice Johnson in convicting Martin.

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[4] (1948) 32 Cr.App.R. 138.

[5] *15th Cumulative Supplement,* para. 812.

[6] (1910) 5 Cr.App.R. 4.

Frederick Dean's case

In *Frederick Dean* [7] there is a clear statement on the need for a warning to the jury as to corroboration of the evidence of a co-prisoner. The appellant, together with two other men, had been convicted of knowingly receiving stolen property. McCulloch, one of the co-prisoners, said he had been given all the stolen property to sell by the appellant. This property consisted of over fifty pieces of jewellery. Three only had been found in the possession of the appellant, and as to these he disclaimed guilty knowledge. Shearman J., delivering the judgment of the Court of Criminal Appeal, said:

> "He, McCulloch, is only entitled to be considered as an ordinary witness on oath—as the Assistant Recorder said he was—in so far as he is defending himself; but when in his [*sic*] position he gives evidence against others he is not entitled to be judged as any other witness: and on this point there was no direction to the jury and no warning that he was a suggested accomplice. . . . The appeal must be allowed."

Barnes and Richards

The next case to be considered is *Barnes and Richards*.[8] The appellants, together with three other persons, were charged with murder as a result of a bomb explosion in a street in Coventry which caused the death of five persons. The appellants were convicted, the other three persons were acquitted. On the question of corroboration Lord Hewart C.J. said:

> "The witnesses whose evidence it is said needed corroboration are Mrs. Hewitt and Mrs. O'Hara. They were not called as witnesses for the prosecution. They went into the witness-box to give evidence, and they gave evidence, on their own behalf, and the rule with regard to corroboration does not seem to apply to such a case. As was stated in *Baskerville* [9]: 'The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person on the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it

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[7] (1924) 18 Cr.App.R. 21.

[8] (1940) 28 Cr.App.R. 154.

[9] 12 Cr.App.R. 81 at p. 89.

> probable that the story of the accomplice is true and that it is reasonably safe to act upon it.' In no respect is it true to say that the evidence, which is referred to in this part of the notice of appeal, was evidence called by the prosecution nor was the jury being asked by the prosecution to act upon the evidence given by either of these two women. One looks in vain for any case in which it has been decided that, where prisoners are tried together on the charge of being jointly concerned in the commission of a crime and they elect to give evidence, and in doing so one of them happens incidentally to give a piece of evidence which tells against another of the persons accused, it is requisite that the warning with regard to the evidence of accomplices should be given. . . . In the opinion of this court, on the facts of this case, upon the evidence in this case, the necessity for a warning with regard to the evidence of accomplices did not arise."

Throughout this passage the learned Lord Chief Justice speaks, without qualification, of the evidence of co-prisoners: he nowhere adverts to the question whether or not the two women were in fact *participes criminis*. He does in an earlier part of his judgment refer to " some confusion of thought in the contention that it was the duty of the judge to direct the jury that here they were dealing with the evidence of accomplices," but he nowhere makes explicit the real reason why the necessity for a warning did not arise on the facts of the case, namely, that the two women were not accomplices since they were both acquitted. The point was taken by counsel for the Crown, who said: " In the present case, however, the question of corroboration did not arise at all, because the jury found that the two women were not accomplices of the appellants." They did not admit the offence; they had not been previously convicted of it; they were not found guilty of it at the trial at which they gave the evidence said to need corroboration: therefore they were not accomplices. Prisoners giving evidence against other prisoners are not accomplices—perhaps one might say, not " confirmed accomplices "—until conviction. Until conviction they are merely " suggested accomplices." If they are acquitted, they were never accomplices at all. It is submitted, with respect, that the remarks in *Barnes and Richards* dealing with this ground of appeal are largely in the nature of *obiter dicta,* and that the true reason for the rejection of this ground of appeal on the facts of the case was that the prisoners, whose evidence was said to need corroboration, were shown by the verdict of the jury not to be accomplices.

Garland's case

In *Garland,*[10] the court said: " It is said that the evidence given by the co-defendant of the appellant was very detrimental to him, as no doubt it was. It is said that the learned Recorder (of London) omitted to remind the jury that in the position which she occupied in the case she ought to be treated as an accomplice, because her statement admitted to a great extent the case against her, and went on to state that she did what she did at the instance of the appellant. There is no doubt of the correctness of that proposition of law."

Rudd's case

Finally, in *Rudd*,[11] where it was argued for the applicant that his co-prisoner Powell had been in the position of an accomplice and that the jury should have been directed with regard to corroboration, the court said: " We agree that it would have been very much better if there had been a direction. Indeed, we go so far as to say that there should have been a direction that Powell's evidence was in all probability that of an accomplice"—(*cf.* Shearman J.'s " suggested accomplices " in *Frederick Dean*)—and that if the jury took that view they ought not to act on it unless they found it to be corroborated. In fact there was no such direction, but, inasmuch as there was ample corroboration of the evidence of Powell both by other witnesses and by the admissions made in the witness-box by the applicant himself, we see no reason why we should not adopt the same course as we did in *Garland* and say that for that reason, whether it be called an application of the proviso to section 4 of the Criminal Appeal Act, 1907, or referred to in some other way, we shall refuse to interfere with the verdict of the jury, being satisfied that there has been no miscarriage of justice."

In the judgment in *Garland* it is said that the co-prisoner's statement " admitted to a large extent the case against her." She was, therefore, presumably convicted, and thus found by the verdict of the jury to be an accomplice. In *Rudd* as reported in *The Criminal Appeal Reports* there is no indication whether Powell was convicted or acquitted. In *The Times Law Reports*,[12] however, it is made clear that Powell was convicted with Rudd. It is submitted, with respect, that whether or not a prisoner who incriminates a fellow prisoner is himself convicted is an essential element to be included in the report of any such case.

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[10] Which is reported in a note on p. 46 of 29 Cr.App.R.

[11] (1948) 32 Cr.App.R. 138.

[12] Vol. 64, p. 240.

Conclusions

It has been assumed up to this point that a co-prisoner who is acquitted at the conclusion of the trial is not an accomplice and that the lack of a direction as to corroboration of his evidence is irrelevant. It is submitted that in law this must be so. A co-prisoner must either be an accomplice or not an accomplice in relation to the rule as to corroboration, and if the jury have found that he did not take part in the offence, then he cannot be regarded as an accomplice. It may well be that the evidence, while not sufficient to convict the co-prisoner, raises a strong suspicion against him and shows him in an unfavourable light. In such a case the judge would no doubt comment on the resulting diminished credibility of the co-prisoner, and might suggest that the jury ought to look for some corroboration, but this would be in pursuance of his general duty to instruct the jury and not in pursuance of the particular rule as to the corroboration of accomplices.

To sum up, it is submitted that whenever (1) the case for the prosecution against prisoner A is based partly or wholly on the evidence of co-prisoner B or (2) there is anything in the evidence of co-prisoner B which may influence the jury in their consideration of the case against prisoner A, the jury should be directed that if they find that co-prisoner B is an accomplice, then it will be unsafe for them to rely on his evidence as against prisoner A unless it is corroborated.

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P. C. Hubbard

1958

Recognisances and Conditions

A. J. CHISLETT, *Clerk to the Croydon Justices*

An important pronouncement made by Lord Goddard C.J. in the Court of Criminal Appeal focuses attention on a new aspect of a very old procedure.

A case (*R.* v. *McCartan*) having been referred to the court by the Secretary of State under section 18 of the Criminal Appeal Act, 1907, Lord Goddard C.J. gave the judgment of the court and pointed out [1] that Eire and Northern Ireland do not contain petty sessional divisions within the meaning of the Criminal Justice Act, 1948, and it would, therefore, not be proper to make a probation order requiring an offender to be under the supervision of a probation officer and to make it a term of the probation order that the probationer was to return to Ireland and stay there. Such an order would be unenforceable. Lord Goddard then went on to indicate the proper way to deal with such a situation, saying that "if the court has before it one of these young men whom the court thinks ought to be made to go back to Ireland instead of remaining in this country, and the court thinks that this country should not be put to the expense of keeping him at Borstal, the way to do it is to bind him over and make it a condition of the recognisance that he returns to Ireland and does not return to this country for such period as the court may think fit." He recalled that that was the order the court had made in *R.* v. *Flaherty*,[2] where a boy of nineteen from Ireland had been bound over in his own recognisances in the sum of £10 that he accompany an escort to the train, where he would be sent to Eire that night or as soon as arrangements could be made, and he was not to land again in this country for at least three years. Such an order his Lordship added, was to be made in the form of a common law recognisance, not in the form of a probation order.

Power to bind over

The law relating to the power to bind over to keep the peace and to be of good behaviour was exhaustively reviewed by Professor Glanville Williams in an article in the *Modern Law Review* for

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[1] [1958] 3 All E.R. 140.
[2] *The Times*, June 24.

October, 1953, where he dealt with the common law powers of justices to order a person to enter into a recognisance, with or without sureties, as a form of preventive justice. He observed that "although application may theoretically be made to the High Court or quarter sessions, in practice the power of binding over is exercised by petty sessional courts," but reference was made to the case of *Trueman*,[3] where an offender was sentenced by Avory J. to a maximum sentence of one year's imprisonment, and was also ordered to find sureties for his good behaviour, a judgment which was affirmed on appeal.

Since that article appeared there has been another important decision in *R.* v. *Sharp and Another*.[4] Here the Court of Criminal Appeal quashed convictions on an indictment for "affray," but acting as justices of the peace (since all judges are on every commission) ordered the appellants to enter into recognisances with a surety of £50, "to keep the peace and be of good behaviour and in default to go to prison for six months."

Reference can also be made to Archbold's *Criminal Pleading* at pp. 233, 234, where authority is given for the proposition that any person convicted (on indictment) of any misdemeanour, or of any felony within the Criminal Law Consolidation Acts of 1861, or later Acts superseding them, may, in addition to any other punishment be required to enter into recognisances, with or without sureties, to keep the peace and be of good behaviour.

Magistrates have other powers in relation to recognisances—they can grant bail; bind over witnesses to attend a court of trial; bind over a convicted person to prosecute an appeal; bail a person on condition that he attends on a doctor or at an institution for examination, etc. These are not relevant to the present subject except in one respect, namely, the enforcement of the recognisance.

What is a recognisance?

No better definition of a recognisance can be given than that in Kenny's *Outlines of Criminal Law*. First, quoting Blackstone, Kenny writes: "A recognisance is an obligation of record, which a man enters into before some court of record, or a magistrate duly authorised, with condition to do some particular act, as, to keep the peace." The assent of the party bound "consists in an admission of his owing to the Crown some specified sum of money unless a condition be fulfilled . . . if the condition be not fulfilled the recognisance may at once be estreated."

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[3] [1913] 1 K.B. 164 (C.C.A.).

[4] [1957] 1 All E.R. 577.

The common form of a recognisance is: "The under-mentioned persons each acknowledge that they owe to our Sovereign Lady the Queen the following sums, namely A.B. as principal the sum of X pounds, and C.D. and E.F. the sum of Y pounds each, payment thereof to be enforced severally against them by due process of law if the principal fails to comply with any of the conditions endorsed hereon." The order is commonly called a binding over.

Failure to find sureties or to enter into a recognisance

A person who fails to enter into a recognisance ordered by assizes or quarter sessions, or who fails to find sureties, may be imprisoned for not more than a year. In respect of such a failure a magistrates' court may order imprisonment not exceeding six months.[5]

The recognisor will be released from prison as soon as he enters into the recognisance or finds the sureties.

Conditions attaching to recognisances

The preceding paragraphs have dealt with recognisances to which are attached conditions—to be of good behaviour, to keep the peace, to give evidence, to appear on remand, etc.

It has hitherto been considered that a magistrates' court cannot attach to a recognisance any condition other than one of these, for the reason that no authority exists for attaching other conditions. For example, one reads sometimes of a person being bailed on condition that he surrenders his passport, or on condition that he undertakes not to molest witnesses, or that he reports to the police daily. While, of course, the court can properly refuse to grant bail unless such an undertaking is given, it is regarded as highly doubtful whether such an undertaking can be formally incorporated as in condition of a recognisance, because section 105 of the Magistrates' Courts Act, 1952, sets out one condition only, namely, to appear at a time and place stated in the recognisance. Any other conditions have been regarded as *ultra vires*.

The Court of Criminal Appeal has now, however, introduced a novel principle. Not only may a defendant be bound over with a condition to keep the peace or be of good behaviour, but an additional condition may be added—in this case that he returns to Eire and stays there. Two points arise.

Hitherto, a breach of a recognisance to keep the peace or to be of good behaviour has usually been in itself either a breach of the law (as where the recognisor has been subsequently convicted of assault, larceny or some other crime), or else is conduct which is in itself a breach of the peace or a failure to be of good behaviour (*e.g.*, writing offensive letters, leading an idle life, conduct *contra bonos mores*). It is, however, no breach of the criminal law to come to England from Eire, neither is it in itself a failure to be of good behaviour. The condition of the recognisance is the equivalent of a deportation order, and its infringement renders the defendant liable to punishment.

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[5] s. 91 of the Magistrates' Courts Act, 1952; and see also *Everett* v. *Ribbands* [1952] 2 K.B. 198.

Secondly, if such a condition may be inserted in a recognisance, the door is clearly open for any kind of condition to be inserted according to the whim of the judge or magistrate—that the defendant is not to live in London ; that he must not live with his wife ; that he must report to the police daily ; that he must attend church every Sunday. The prospects of a recognisance becoming a measure of oppression are terrifying.

Enforcement of a recognisance

We have seen that a recognisance is an undertaking to pay a sum of money in the event of certain conditions not being fulfilled. In that event, the recognisance is estreated.

So far as magistrates' courts are concerned, the procedure for the estreatal of a recognisance entered into before such a court is clearly laid down in section 96 of the Magistrates' Courts Act, 1952, which provides for forfeiture of the sum in which the person and his sureties, if any, are bound, in whole or in part. Payment is enforceable as though the sum due were ordered to be paid as a fine imposed on summary conviction.

Where a recognisance is forfeited before a court of assize or quarter sessions, an order may be made under section 14 (1) of the Criminal Justice Act, 1948, fixing a term of imprisonment which the person liable to make the payment is liable to undergo if the sum is not paid, and section 15 provides for the recovery of that sum and for the release from prison of the recognisor on payment of the sum due.

There is nothing new here ; the sanction behind a recognisance is forfeiture of the sum in which the recognisor is bound. Accordingly, the Irishman who returns to England in defiance of a condition of a recognisance is liable to lose the sum in which he was bound—in *Flaherty*'s case, the sum of £10, and no more.

But, doubt has been thrown on this by the case of *R.* v. *Sharp* referred to above. Sharp was bound over in February, 1957, with a surety in £50 to keep the peace and be of good behaviour. A failure to comply with the conditions would, we would think, render him liable to forfeit £50. But on July 2, 1957, *The Times* reported that Sharp had appeared before the Court of Criminal Appeal for failing to be of good behaviour, and that a police officer had given evidence of Sharp's conviction in a magistrate's court of offences under the Road Traffic Acts. The report further stated that Lord Goddard had reminded Sharp that when he was bound over he had been told that if he misbehaved himself during the next twelve months he would go to prison for six months. The father's surety of £50 was forfeited, although only £30 was actually estreated, and Sharp himself was sent to prison for six months.

Here we have something new—a recognisor who has failed to comply with a condition of a recognisance (and one, moreover, stated by the judges to have been ordered by them as justices of the peace), and who is not dealt with by forfeiture of his recognisance, but by a sentence of imprisonment. The sentence was, in fact, that which was ordered to be imposed in the event of his failing to find sureties. There was no appeal against the sentence, but we are obliged to ask whether it was, in fact, lawful. We have certainly found no precedent for failure to observe a condition of a recognisance having been met by any method of punishment other than forfeiture of the sum due under the recognisance.

Application to magistrates' courts

The final point occasioned by *McCartan's* case is whether a magistrates' court is thereby given power to insert conditions in a recognisance, other than the conditions for which specific statutory authority exists, *e.g.*, to keep the peace, to be of good behaviour, to appear at a time and place, etc. Can a magistrates' court order a defendant to stay out of the country?

Having regard to the lack of authority we feel that the only safe answer to the question is in the negative.

Binding over to come up for judgment

The foregoing has been written on the basis that the orders under consideration were simple orders to enter into recognisances to keep the peace or to be of good behaviour.

Courts of assize and of quarter sessions have always had a common law power to order a convicted person to enter into a recognisance, with or without sureties, to come up for judgment when called upon.

Magistrates' courts were given this power, but in respect only of "trifling" offences by section 11 of the Summary Jurisdiction Act, 1879. The power was extended somewhat by the Probation of First Offenders Act, 1887, and, following the Probation of Offenders Act, 1907, was in wide use until the Criminal Justice Act, 1948, repealed the provision. Probation then took its new and present form, with a consent replacing the recognisance and no requirement to come up for judgment.

So far as assizes and quarter sessions are concerned, it would appear that no time limit need be specified for the coming up for judgment[6] and when a person is brought up the facts should be as strictly proved as if he were indicted for a crime.[7]

If the judgment in the case of *McCartan* had been given by reference to this power of binding over to come up for judgment; if that was what was intended when the Court of Criminal Appeal acting (as they said) as justices of the peace bound over *Sharp* then the consequences that would flow if the prisoners were subsequently brought up for judgment would have been unexceptionable. It is because of the apparent confusion between the various kinds of recognisances that there has now arisen doubts in the minds of many whether the two decisions are as helpful as they were intended to be.

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[6] *R.* v. *David*, 27 Cr.App.R. 50.
[7] *R.* v. *McGarry*, 30 Cr.App.R. 187.

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A. J. Chislett
1958

Aspects of Probation

By T. J. Clogger, *Probation Officer, Tanga, Tanganyika*

In the case of a deliberate offence can an offender be discharged absolutely? In *Picket* v. *Fesq,*[1] it was held on appeal that a court of summary jurisdiction must not exercise the power now contained in section 7 (1) of the Criminal Justice Act, 1948 of granting a defendant an absolute discharge, where the offence was deliberately committed, even though the facts show that the defendant was a respectable person and was sorely tempted to commit the offence.

On May 10, 1949, the respondent appeared before the Lewes (Sussex) justices on an information preferred against her by a chief prevention officer of Customs and Excise alleging that in breach of section 186 of the Customs Consolidation Act, 1876, as amended by section 15 of the Finance Act, 1935, section 12 of the Finance Act, 1935 and section 12 of the Finance Act, 1943, the respondent had fraudulently attempted to evade a restriction on the export of goods, namely, 85 one-pound Bank of England notes, the export of which without the permission of the Treasury was prohibited by section 22 of the Exchange Control Act, 1947. The respondent pleaded guilty; and the magistrates dismissed the information under section 1 (1) of the Probation of Offenders Act, 1907, which was still then in force. The prosecution appealed against this decision by case stated to the High Court.

The justices stated that the respondent was an elderly woman of good character whose income was only £60 a year and who was partially dependent on one of her sons. Owing to bad health and forgetfulness she had omitted to apply for travellers' cheques. The justices said they had considered that having regard to the character. antecedents, age, health and mental condition of the respondent and the extenuating circumstances they had considered it inexpedient to inflict any punishment.

On October 21, 1949, the appeal was heard by a Divisional Court consisting of Lord Goddard C.J., Croom-Johnson and Lynskey JJ. who allowed the appeal and directed the justices to impose a penalty.

In the course of his judgment Lord Goddard pointed out that the power of a court of summary jurisdiction not to impose any penalty on finding an offence proved could be traced back to section 16 of the Summary Jurisdiction Act, 1879, which enabled the court to dismiss the information on payment of not more than 40s. damages and costs. It had, however, been held in *Phillips* v. *Evans* [2] that it was an improper exercise of this discretion to use it where the offence had been deliberately committed. In that case the defendant had refused to take out a dog licence. Lord Goddard said that the next step was the replacement of this section by the well-known provisions of section 1 of the Probation of Offenders Act, 1907, which was in force at the time which, as from August 1, 1949, had been replaced by section 7 (1) of the Criminal Justice Act, 1948. This altered the law by getting rid of the illogical provision in the Probation of Offenders Act that no conviction should be recorded although the offence had been proved.

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[1] [1949] 2 All E.R. 705.

Turning to the facts of the present case, Lord Goddard said that a good deal of sympathy could be felt for the respondent; but the Exchange Control Act, 1947, was passed to protect sterling in the serious financial situation which exists in this country and it was of the utmost importance that its provisions should be observed. It was said, continued Lord Goddard, that she was a person of good character—that was to say, no convictions had ever been recorded against her; but very often persons who committed currency offences were persons who had not been previously convicted of any other offence. As to her mental condition and health it was sufficient to say that she clearly knew that she was breaking the law and had intended to do so.

There was, said Lord Goddard, nothing in the respondent's character, antecedents, age, health or mental condition to justify the application of this provision. The offence was not trivial nor were the circumstances such as to be extenuating. The result was that the case would have to be remitted to the justices with a direction that a penalty must be imposed and that penalty would have to be more than a nominal one.

In the Irish case *Att.-Gen.* v. *Cullen*,[3] the question of appeal was argued. In England, section 7 (1) of the Criminal Justice Act, 1925, enacted that where a probation order is made against a person who did not plead guilty or admit the truth of the allegation " he shall have a right of appeal against the order to a court of quarter sessions on the ground that he was not guilty of the offence charged, in the same manner as if he had been convicted of the offence." Section 12 of the Criminal Justice Act, 1948, retains this right of appeal against a probation order. In Ireland, however, the question of a right of appeal must be settled upon a construction of section 1 of the Probation of Offenders Act, 1907, without any other assistance. In the case quoted the appellant was charged with the larceny of half-a-crown and consented to summary trial. The order made in the District Court recited the charge, the consent and the trivial nature of the offence, stated that the justice found the charge proved but considered that it would be inexpedient to inflict any punishment, and concluded with the words: "I did, without proceeding to a conviction, order that the charge be dismissed pursuant to the Probation of Offenders Act, 1907." It was argued for the Attorney-General in the Circuit Court, to which the accused appealed, that no conviction was recorded, that the order amounted to a dismiss on the merits and that no appeal lay.

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[2] [1896] 1 Q.B. 305.

[3] 86 Ir.L.T.R. 26.

For the appellant, it was argued that under the Act of 1907, the court has a right to "suspend conviction," "as a notional dismiss," and that, in the order here made by the justice, the words "without proceeding to a conviction" were not in the operative part of the order and could not, therefore, determine its nature. This argument prevailed; it was held that an appeal lay; evidence was led again, and the defendant was acquitted and the justice's order reversed.

Breach of Requirement of Probation Order

Where a prisoner is brought before a court for a breach of a probation order, the breach alleged should be put to him in the clearest possible terms and he should be asked to say whether he admits it or not. First, he should be told where he was originally convicted and what happened to him; then he should be told how the breach is alleged to have taken place and, if it be by a further conviction, then the occasion of that conviction and the adjudication of the court should be mentioned; then he should be asked to say whether he admits these facts. If he does, the court can then deal with him; if he does not, then a trial will take place, albeit without a jury, and the prisoner must be asked whether he desires to give evidence or call witnesses. The court will then have to decide whether the breach has been proved: *R.* v. *Devine* (*Practice Note*).[4]

In December, 1955, a girl aged about nineteen was convicted of larceny and placed on probation for two years by a magistrates' court. Having committed breaches of that order she was brought on May 4, 1956, before a different magistrates' court, which was the supervising court for the district in which she was then residing. The court made a new probation order for three years from that date. A motion was made on behalf of the girl for certiorari to quash the second probation order on the ground that, as the original probation order had not been discharged, the effect would be that the girl would be placed on probation for more than three years, contrary to section 3 (1) (para. 454) or Schedule 1, paragraph 3, proviso (*a*) of the Act. It was held that the probation order of May 4, 1956, was valid because under section 6 (3) the magistrates' court had power to deal with the girl in any manner in which she could have been dealt with if she had just been convicted of the original offence, and this included the power to put her on probation for three years from May 4, 1956, and the new order, inasmuch as it did not amend the original order, did not infringe Schedule 1, paragraph 3, proviso (*a*) further, the original probation order, though not formally discharged, became ineffective on the order of May 4, 1956, being made: *R.* v. *Havant Justices, ex p. Jacobs*.[5]

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[4] [1956] 1 W.L.R. 236.

Probation and Discharge

The form of probation order given in the Schedule to the Magistrates' Courts (Forms) Rules, 1952,[6] states certain conditions merely as specimens of the requirements a court can impose and they are not a statutory requirement. If a court simply says that it makes a probation order, the effect is to make an order requiring the probationer to be under the supervision of a probation officer for a period specified in the order. If the court desires to impose other conditions, it must specifically impose such conditions and at the same time explain the nature of them to the probationer; otherwise they will not be effective. The first condition in the form that the probationer " shall lead an honest and industrious life " is not desirable; the condition should be that he " shall be of good behaviour and keep the peace." [7]

Fine not to be imposed

R. v. *Parry & Others* [8] decided that a fine could not be imposed, in addition to a probation order, as a fine was a sentence.

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[5] [1957] 1 W.L.R. 365; 41 Cr.App.R. 62; 101 S.J. 173; [1957] 1 All E.R. 475.

[6] S.I. 1952, No. 2191.

[7] *Per* Lord Goddard C.J. in C.C.A. [1952] W.N. 120; [1952] 1 T.L.R. 593; 96 S.J. 166; 35 Cr.App.R. 207.

[8] [1950] 114 J.P. 720.

Determination of age

Decided cases have held that a person attains a given age at the first moment of the day preceding his birthday.[9] A person is twenty-three until he becomes twenty-four.[10]

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T. J. Clogger

1958

The Police (Property) Act, 1897, Section One

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> " (1) Where any property has come into the possession of the police in connexion with any criminal charge . . . a court of summary jurisdiction may, on application either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet.
>
> " (2) An order under this section shall not affect the right of any person to take within six months from the date of the order legal proceedings against any person in possession of property delivered by virtue of the order for the recovery of the property, but on the expiration of those six months the right shall cease. . . ."

This is an interesting little enactment designed to deal with the most prominent administrative problem raised by the restitution of stolen property: that of disembarrassing the police of other people's belongings. Subsection (1) gives a right to apply to a court of summary jurisdiction for directions in a case of difficulty, and certain powers of the court to dispose of property.[1] Its particular interest in the field of restitution of property in criminal proceedings is that, in practice, when the court of conviction refuses to make an order under the Larceny Act, 1916, s. 45,[2] the question to whom the property shall go often falls to be determined under this section.[3]

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[9] (1931) 95 J.P. 172.

[10] *R.* v *Chapman* (1931) 95 J.P. 205.

[1] Part of the text of subs. (1) not relevant to this article has been omitted, as also has subs (3). Neither of these omissions impairs the sense of the substantive words.

To give the court jurisdiction an application must first be made. Potential applicants are limited to the police and claimants to the property. The inclusion of the latter has produced some curious cases. Thus there has been an application, unsuccessful it need hardly be said, by one convicted of larceny, on the ground that the property he had been convicted of stealing was his own. The converse case has also occurred: an applicant who had been acquitted of larceny argued that the prosecutor could not be heard in opposition.[4] Application has also been made in respect of property the theft of which was disclosed only when other offences were asked to be taken into consideration,[5] and a convicted blackmailer is recorded as having applied for what were probably part of the proceeds of his crime.[6] Efforts such as these are no doubt the exception rather than the rule, but they render less surprising than might otherwise be the case the frequency with which applicants appear to be in prison.[7]

" Owner "

Unfortunately the admirably clear terms of the section have been unnecessarily obscured in connection with the meaning of the word " owner." In the case of *Marsh* v. *Commissioner of Police*,[8] property was taken from one who had a lien over it but who was hardly the owner in any usual sense of that term. There had been a conviction for larceny of a ring belonging to some jewellers. The police had taken possession of the ring from an hotelier to whom the offender had handed it as security for an unpaid bill. Both the jewellers and the hotelier claimed the ring from the police on an application under this Act, the jewellers asserting ownership and the hotelier setting up a lien alleged to be superior to the owners' claim so far as immediate right to possession went. The magistrates decided in favour of the hotelier. The Divisional Court reversed this decision, but were in turn overruled by the Court of Appeal.

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[2] As to which see [1957] Crim.L.R. 312.

[3] See, *e.g.*, 115 J.P. 43. Considerable sums of money may be affected. Recent examples are £300 (20 *Journal of Criminal Law* 1), £348 and £791 10s. 0d. (*The Times*, December 22, 1955), and £200 ([1957] Crim.L.R. 189). The Act generally is expressly applied by the Prevention of Fraud (Investments) Act, 1958, s. 14 (11), and the Incitement to Disaffection Act, 1934, s. 2 (4). It also applies to the Metropolitan Police Act, 1839, s. 66, the City of London Police Act, 1839, s. 48, the Larceny Act, 1861, s. 103, and the Pawnbrokers Act, 1872, s. 34.

[4] 6 *Journal of Criminal Law* 161. The opposition was heard.

[5] *Ibid.*

[6] 115 J.P. 233.

[7] *e.g.*, *The Times*, December 22, 1955. For a more normal example of the use of the Act see [1957] Crim.L.R. 189.

[8] [1945] K.B. 43.

Unfortunately the Court of Appeal did not decide as much as this bare statement might imply. Strictly, the only question for decision on appeal was whether the Divisional Court had acted correctly in ordering delivery of the ring to the jewellers, and it was held that they had not. The loophole thus created was taken advantage of to avoid some of the problems of interpretation to which the situation gave rise. The section says that property may be ordered to be returned to the person appearing to be its "owner." The jewellers were clearly the owners, but the Court of Appeal were uncomfortable about the conclusion to which this led because of the ease with which it appeared to defeat the innocent hotelier's lien. One might have thought that the alleged lien were suspect under the doctrine of *nemo dat quod non habet,* but this consideration did not prevail. Instead, refuge was taken in the obscure pronouncement that whilst it would have been wrong for the magistrates to order the ring to be handed to the jewellers, no opinion needed to be expressed whether it was correct to have ordered delivery to the hotelier. This was found to satisfy all parties [9] because the jewellers had undertaken to pay the hotel bill if the ring were returned to them. The only conclusion to be drawn from this demonstration of how to adjudicate upon a case without actually deciding it is that the words "appearing . . . to be the owner thereof" must not be taken too literally. If the ownership is clogged, all is obscure.

The Irish solution

This situation is quite unnecessary. The section says that the magistrates have a discretion to restore to the owner, but no one else is mentioned. Obviously the police do not want the property to be left on their hands. Rights of civil action are expressly saved for six months by subsection (2). If the owner cannot be ascertained, the magistrates may make such order as they see fit. It is submitted that these factors point to only one conclusion. The summary court should be free to return the property to the true owner irrespective of other claims, not because this is necessarily the best solution as between the claimants, for whom Parliament was evidently not legislating here, but because it is the simplest method of relieving the police of responsibility for other people's goods. At present *Marsh* v. *Commissioner of Police* stands in the way of this approach to the statute without substituting any other, but the view put forward here is supported by the Irish case of *Louth County Justices*.[10] There, the police had taken goods from a pawnbroker after a warrant had been issued for the arrest of the pledgor. The charge was not proceeded with, but on an application under this Act the property was ordered to be returned to the original owner without any arrangement being made for compensation of the broker.

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[9] Except, perhaps, the magistrates. They had been unable to use the "such order . . . as . . . may seem meet" power because the owner appeared, albeit in the alternative, only too clearly.

This order was upheld on appeal. Lord Cherry C.J. said[10]: "The wording . . . is very wide, and was intended to deal not with any question as to the property in the goods, but with the possession of them. It was intended to relieve the police of the custody of goods which had come into their possession in discharge of their duty, leaving unsettled any question of ownership. . . . The wording . . . is most general, and applies to any case where the police have got actual possession of stolen property, whether obtained from the thief or a third party."[11] It might be objected that that is exactly what the matter of lien in *Marsh's* case was: a question of possession. In answer to this it is submitted that the section was obviously intended to dispose of the possession by the police and not to decide about anyone else's possession, except incidentally to that purpose.

It is not intended to suggest that subsection (1) could not be improved. For example, under the interpretation here contended for, an innocent third party may be deprived of his possessory lien, as might have been the case in *Marsh* v. *Commissioner of Police* and was the case in *Louth County Justices*. To deal with this sort of difficulty it would probably be best to enact that where the police have taken property from anyone other than an offender it should be returned to that person. The claimants could then fight it out between themselves without embarrassing the police. Such a rule could be supplemented by a power to return the property to anyone else by consent. Since, where property has been taken from an offender, no trouble over lien can arise, the magistrates in that case could retain the wider powers they already have under subsection (1).

The concluding words of subsection (1) appear to give the court a very wide discretion to make orders in respect of property, but it should be noticed that the power is limited to cases where the owner cannot be ascertained. It is perhaps possible to argue that *Marsh* v. *Commissioner of Police* was a case of the owner being unascertainable, but this seems very doubtful. As has already been seen, part of the trouble there was that the ownership of the ring was quite clear.

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[10] (1916) 50 Ir.L.T. 191, 192–193.

[11] The word "stolen" is obviously not meant to be taken too literally.

In the exercise of the court's discretion goods have been ordered to be sold for charity where the ownership could not be ascertained.[12] The proceeds of the sale of goods unlawfully obtained may be disposed of under this section as well as the goods themselves,[13] and "property" in subsection (1) also includes money other than such proceeds.[14]

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[12] 115 J.P. 233.

[13] 20 *Journal of Criminal Law* 1, following *D'Andrea* v. *Woods* [1953] 1 W.L.R. 1307.

[14] [1957] Crim.L.R. 189.

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C. Howard
1958

Ice-Cream

By F. G. HAILS, *Solicitor*
Clerk to the Dartford Justices

At [1958] Crim.L.R. 184 there is a brief report of the case in which a holder of a justices' on-licence was fined £5 for selling ice-cream at a public-house where food was not prepared or served, contrary to the provisions of the Food and Drugs Act, 1955, s. 16: as section 135 of that Act defines " food " as including " drink, chewing gum and other products of a like nature and use, and articles and substances used as ingredients in the preparation of food or drink or of such products, but does not include—

(*a*) water, live animals or birds,
(*b*) fodder or feeding stuffs for animals, birds or fish, or
(*c*) articles or substances used only as drugs "

and as the main purpose of a public-house is to sell " drink " other than water, we thought the subject one into which a little research might prove interesting.

The obligation to register premises where ice-cream is sold or manufactured for sale, is to be found in section 16, which also places premises where sausages or potted, pressed or pickled foods intended for sale are prepared and manufactured under a similar obligation, and the registration is to be carried out by the local authority—that is to say, the county, or county borough, council. Premises used wholly or mainly as catering premises, schools and clubs are not obliged to register, and section 135 defines catering premises as those where, " in the course of a business, food is prepared and supplied for immediate consumption on the premises." This section does not define the verb " to supply," the meaning of which is surely clear, but " preparation " is laid down, " in relation to food," to include " manufacture and any form of treatment."

Analysing these definitions, there can be no doubt at all that a public-house fulfils many of the essentials of a catering establishment: " food," that is to say, drink other than water is supplied for " immediate consumption on the premises," and the place is used " wholly or mainly " for this purpose. Some doubt there may be as to whether the food is "prepared," but so wide is the definition that it is submitted that many of the operations performed by the landlord do amount to the preparation of food, within the meaning of the Act.

Take draught beer, for instance: although modern brewing methods have reduced the duties of the landlord relating to this drink, and the difficult processes of racking and fining may in some cases be past memories, every publican has to do something to his beer before it is fit to sell, and what he does, even if it is merely cooling it, must, in common usage of the language, be a "form of treatment," just as surely as the application of heat to a proprietary meat pie in a pies and peas shop is "treatment." For many years it has been a not unusual practice to chill bottled beer, usually lager, in the summer by placing it in a tub packed with ice, and now the custom of keeping the ready-to-use bottles on refrigerated shelves is spreading rapidly. It is clear that alteration of temperature is "treatment," and if the landlord chills his ale he must be preparing it for consumption. It is not pertinent to argue that the beer can be drunk without being cooled, for meat can be eaten raw, and pies cold. In either case the treatment is to make the food more acceptable to the taste of the customer. Then there is the question of the mixed drink: the barman who makes a cocktail, either with shaker or swizzlestick, is preparing his liquid food just as the "soda-jerk" does with his whisk and his soft drinks, or as the espresso bar operator with his boiling machines. To mix whisky and soda, gin and tonic, or rum and peppermint, is in each case "treating" food to render it fit for sale to the taste of the particular customer.

One can continue to multiply instances of this kind, and, of course, the only definite answer can be given by an appellate court of record. So far nobody has thought fit to take the matter to the Divisional Court, but at present there is a growing tendency for local authorities to prosecute public houses for selling ice-cream, on the ground that ice-cream is primarily a children's commodity, and that it is not desirable to lure innocent youth into public-houses with the bait of the succulent ice. That this result may follow from an Act which is designed mainly to ensure that wholesome food is sold in hygienic surroundings may seem strange, but section 19 allows the local authority to refuse, or to cancel, registration on the grounds, *inter alia*, "that the premises or any part of the premises are otherwise unsuitable (having regard to considerations of hygiene and in particular to the situation, construction or condition of the premises, or to any other activities carried on therein)" for the sale or manufacture of ice-cream, or, for that matter, of sausages and so on. There is a right of appeal against refusal to a magistrates' court, but this would not appear to affect the publican who sticks to his guns that his house is a catering establishment, and that he does not require to register.

Practice and Procedure

Magistrates' Courts

Case stated out of time

In WHITTINGHAM *v.* NATRASS[1] (Divisional Court: Queen's Bench: Lord Goddard C.J., Donovan and Ashworth JJ.: [1958] 1 W.L.R. 1016) the facts were that on November 27, 1957, an information was preferred against W. alleging four offences under the Road Traffic Acts. The information was heard on January 22, 1958. W. was convicted and sentenced to a term of imprisonment. W. applied to the justices to state a case. The justices signed a case on May 8. On July 7 the prosecutor's solicitors consented to the lodging of the case stated out of time; and on July 9 the defendant's solicitors lodged the case in the Crown Office. The notice of appeal, which was dated July 22, was lodged in the Crown Office on the same day, and was made returnable on July 30. The Divisional Court took the preliminary objection that the case was stated and lodged out of time.

Held, that where it was desired to have a case stated by the magistrates, or a case lodged in the Crown Office out of time, application to extend the time must be made to the Divisional Court: there was no power to extend the time by consent.

Per Lord Goddard C.J.: "If magistrates do not state a case within the statutory time, that is to say, three months, the court has power to extend the time, but an application to extend the time must be made to it and reasons must be shown as to why the court should extend the time, because if the failure of the magistrates is due to the fault of the applicant, the court will not as a rule extend the time. . . . The rules provide that the case shall be lodged in the Crown Office in ten days and within fourteen days after receiving the case a notice of appeal is to be served . . . Consents cannot be filed to set aside the Rules of the Court . . . The court has power to extend the time, if proper grounds are shown, but an application must be made to the court for that purpose." [D. C.]

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[1] For W.: *Raphael Tuck* (instructed by Lincoln & Lincoln). For the prosecutor: *R. C. B. Parnall* (instructed by James & Charles Dodd for Josiah Hicks, Son & Bullough, Leicester).

[NOTE: The statement in the *Annual Practice*, 1958, Vol. I, p. 1749, that delay beyond the statutory time can be remedied by a consent filed in the Crown Office, is incorrect.

In *Moore* v. *Hewitt* [1947] K.B. 831 it was held that where there is nothing before the court to show why the justices did not state the case (*i.e.*, it does not appear whether the delay is due to the default of the magistrates or that of the applicant) the court has power in its discretion to allow the case to be heard.—J. C. SMITH.]

Summary Justice

Larceny

For stealing sticks of pit explosive a storeman was fined £2 and ordered to pay £2 5s. costs. He said that he took them to make his spring cabbages grow faster; Woodhall: Hexham Magistrates' Court (*Manchester Guardian*, October 8).

Malicious damage

For unlawfully and maliciously destroying oats, contrary to section 24 of the Malicious Damage Act, 1861, by walking across the field in which they were growing, two youths were each fined £1 and ordered to pay £1 damages; George: Neston Magistrates' Court (*Liverpool Echo*, September 26).

Road traffic

Being drunk in charge of an ice cream van contrary to section 15 of the Road Traffic Act, 1920; fined £10 with £4 4s. costs, licence indorsed; Edwards: Nuneaton Magistrates' Court (*Birmingham Mail*, September 29).

Case and Comment *

EVIDENCE

Scotland—capital murder—statement made in answer to charge of assault occasioning grievous bodily harm

H.M. Advocate v. Graham

High Court of Justiciary: Lord Sorn and a jury: 1958 S.L.T. (Court of Session Reports) 167.[1]

It was alleged that G. had stabbed V. in the body in an attempt to break into and to steal from V.'s premises. G. was cautioned and charged with an assault occasioning grievous bodily harm. G. made a statement to the police in answer to the charge. Subsequently V. died; and G. was then cautioned and charged with capital murder. At his trial on the charge of capital murder, the advocate depute proposed to lead evidence of the statement which G. had made in answer to the charge of an assault occasioning grievous bodily harm.

Held, that a statement made by an accused person in answer to a charge of an assault occasioning grievous bodily harm was not admissible at his trial on a subsequent charge of capital murder.

Per Lord Sorn: "The ultimate test is the test of fairness to the accused and I confess to thinking this is a borderline case . . . I cannot altogether rule out the possibility of prejudice to a man making a statement when he didn't know the full gravity of the charge that he was ultimately to be brought to trial upon."

Later in the trial counsel for G. submitted that murder was only done in the course or furtherance of theft if the assailant did it for the purpose of committing theft after he had done the murder.

Held, that it did not matter what the assailant did afterwards: if the assailant was in the course of theft and it was he who did the killing, that was capital murder within section 5 (1) of the Homicide Act, 1957. [D. C.]

Commentary. It is thought that this confession would certainly not have been held inadmissible on these grounds in an English court.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by Professor J. C. Smith, Barrister-at-Law.

[1] For the Crown: *Gillies A.-D.* and *Sutherland* (instructed by Lionel I. Gordon, Crown Agent). For G.: *Thompson Q.C.* and *Hamilton* (instructed by A. Docherty, Lanark).

According to Kenny, " a confession must be excluded if it was made in consequence of any inducement that was of a temporal character and connected with this accusation and that was held out to the accused by a person who had some authority over the accusation ": *Outlines of Criminal Law* (17th ed.), 492. Only if these conditions are fulfilled is the confession inadmissible; and there is no suggestion that the conditions were fulfilled in the present case. The principle underlying the English confession rule is always stated to be that confessions which were obtained in breach of it are unreliable. Quite obviously the reliability of the confession in the present case was unaffected by the death of V. and the alteration of the charge.

Of course, the English court always has a discretion, in a criminal case, to exclude technically admissible evidence if its admission would operate unfairly against the accused: *Harris* v. *D. P. P.* [1952] A.C. 694, 707; but, again, it is thought unlikely that that discretion would be applied in circumstances like those of the present case.

Professor T. B. Smith writes (The British Commonwealth " Laws and Constitution " series, *Scotland*, p. 758, n. 17) of spontaneous voluntary statements by persons in custody that " a certain tendency to exclude on broad grounds of fairness is apparent." The present case is perhaps an illustration of such a tendency. See also *M'Kie* v. *H.M. Advocate* [1958] Crim.L.R. 386, where in similar circumstances the result of a medical examination was held admissible.

Under the now-abolished doctrine of constructive malice laid down in *D. P. P.* v. *Beard* [1920] A.C. 479, it was held that a killing was " in the course or furtherance " of felony if it was done while attempting to commit a felony which was never actually completed: *R.* v. *Stone* (1937) 53 T.L.R. 1046, where the accused caused death while attempting unsuccessfully to commit rape. It was to be expected that the same construction would be put upon the similar phrase in the Homicide Act.

OFFENSIVE WEAPONS

Prevention of Crime Act, 1953—*intention to cause injury—threatening with offensive weapon*

Woodward v. Koessler

Queen's Bench Divisional Court: Lord Goddard C.J., Donovan and Ashworth JJ.: July 30, 1958.[2]

K. was charged before the Reading justices with carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act, 1953. The facts were that K. and others tried to break into a cinema with an iron bar and a sheath knife. When the elderly caretaker came to the door, K. held the knife, then unsheathed, in a threatening manner and said: " Can you see this?" The justices found that he was not carrying an offensive weapon but stated a case for the opinion of the High Court. The court held that the justices had reached a wrong decision, on the ground that, even if the knife was not made for the purpose of causing injury, it had been used to cause injury. In accepting K.'s statement that he did not intend to cause injury they had taken too narrow a view of the words "causing injury." Frightening or intimidating a person is causing injury. In ascertaining the intention of a person in having a weapon with him it is enough to see what use was in fact made of it. [W. H. Tee, Solicitor.]

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[2] For the appellant: *V. Durand Q.C.* and *G. Rountree* (instructed by Sharpe, Pritchard & Co.). For the respondent: *A. McGowern* (instructed by Dennis Berry, Reading).

Commentary. Under the Prevention of Crime Act, 1953, s. 1 (1): "Any person who, without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence."

By section 1 (4) of the Act, "public place" includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise; and "offensive weapon" means any article made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him.

If the possession of an offensive weapon is originally lawful it does not become unlawful because the weapon is used in an illegal manner: *R.* v. *Jura* [1954] 1 Q.B. 503, where the appellant, while using an air rifle at a shooting gallery in a public park, in a moment of anger, fired at his woman companion and caused her injury. His conviction was quashed by the Court of Criminal Appeal; for, if he were guilty, so too would be a gamekeeper at a shooting party who lost his temper and fired his gun at someone, or a soldier who struck a comrade on the head with the butt of a rifle. The Act, it was held, was not intended to cover the case of unlawful use of a lawfully carried weapon. In so holding, the court relied on the long title of the Act: "An Act to prohibit the carrying of offensive weapons in public places without lawful authority or reasonable excuse."

The problem in the present case was a different one. It was not, apparently, contended that the weapon was not originally taken into a public place for an unlawful purpose. The question was whether it was an "offensive weapon" within the meaning of the Act. A sheath knife, unlike a stiletto or dagger, is probably neither made nor adapted for use for causing injury to the person. As K.'s evidence was accepted, that he intended only to frighten or intimidate, and not to cause physical injury, it was possible for the Divisional Court to hold that he could be convicted only by taking a broad view of "injury to the person." Contrast *R.* v. *Yeo* [1951] 1 All E.R. 864 where Gorman J. ruled that a threat to murder (which must surely have been intended to frighten or intimidate) was not a "personal injury" at common law. On the other hand, in *R.* v. *Jarmain* [1946] 1 K.B. 74, the Court of Criminal Appeal held that "the use of a loaded firearm in order to frighten the person victimized into submission is a violent measure"—and no doubt the same is true of the use of a knife. But to hold that frightening is an "injury to the person" goes farther than the holding that it is a "violent measure." The present case is another departure from the supposed rule that penal statutes must be strictly construed—*i.e.*, "if there are two or more reasonably possible meanings the court should adopt the more lenient one": *Remmington* v. *Larchin* [1921] 3 K.B. 404, *per* Bankes L.J. It was certainly at least a "reasonably possible" (if not the most obvious) meaning of the section that it referred to physical injuries.

The proposition that "In ascertaining the intention of a person in having a weapon with him, it is enough to see what use was, in fact, made of it," must, it is submitted, be read in the light of *R.* v. *Jura.* Proof that an accused used a knife so as to frighten would, no doubt, raise a prima facie case against him; but if he were to satisfy the court, on a balance of probabilities, that he had been carrying the knife for an innocent purpose and had used it to frighten in a moment of anger, then he should be acquitted.

PERJURY

No civil action for alleged perjury will lie

Hargreaves v. Bretherton

Queen's Bench Divisional Court: Lord Goddard C.J.: [1958] 3 W.L.R. 463.[3]

In 1955 H. was convicted of offences under the Prevention of Fraud (Investments) Act, 1939, and sentenced to eight years' preventive detention. In 1956 H. brought an action against B. alleging that at H.'s trial in 1955 B. had given false evidence as the result of which he had been convicted and sent to prison, thereby suffering damage. B. denied the truth of the allegation, and denied, further, that such an allegation, even if proved, constituted a cause of action. The issue whether such an allegation could constitute a cause of action was tried as a preliminary point of law.

Held, that an action for damages did not lie at the suit of a person who alleged that he had been damnified by false evidence given against him in criminal proceedings.

Per Lord Goddard C.J.: "It would be most unfortunate if an action for damages for alleged perjury could be brought not only when nobody has been convicted of perjury but, quite apart from that, merely on the allegations of a person who says that somebody has committed perjury, which led to him being damnified either by being convicted or put on trial." [D.C.]

Commentary. It is well established that, if an action of defamation is brought against him, a witness in earlier proceedings has an absolute privilege in respect of words spoken by him in those earlier proceedings, even if they were known to be untrue and were spoken with malice:

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[3] For the defendants: *Martin Jukes Q.C.* and *Roy McAulay* (instructed by Barlow, Lyde & Gilbert). For the plaintiff: *Ashe Lincoln Q.C.* and *L. A. de Pinna* (instructed by Basil Greenby & Co.).

provided only that the words have some reference to the matter in hand: *Dawkins* v. *Lord Rokeby* (1875) L.R. 7 H.L. 744; *Seaman* v. *Netherclift* (1876) 2 C.P.D. 53. If the words were spoken "wantonly and without reference to the inquiry," the privilege would probably not apply. "Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim: 'that man picked my pocket.' I can hardly think that would be privileged": *per* Bramwell B. in *Seaman* v. *Netherclift*, above, at p. 60. The privilege extends to statements made to a solicitor taking a proof of evidence with a view to an action: *Watson* v. *M'Ewan* [1905] A.C. 480.

The policy underlying this rule is based upon the importance of the function of the witness in the administration of justice. The verdict of the jury or the judgment of the court must be founded on the evidence and it is therefore highly desirable that full disclosure should not be hampered by fear of an action for defamation. The fact that witnesses may be compelled to give evidence is thought to reinforce the reasons for the rule.

The present case was not an action for defamation but obviously the same considerations of policy apply. In *Revis* v. *Smith* (1856) 18 C.B. 126 at attempt to sustain an action analogous to one for malicious prosecution similarly failed. The plaintiff in that case did not allege that the defendant knew that the statements were false; but Jervis C.J. thought that the result would have been the same if he had done so.

The dictum of Lord Goddard C.J., quoted above, is, with respect, not an entirely convincing reason for the decision; for civil courts commonly try cases which involve what is, in effect, an allegation of crime: *cf.* Cross, *Evidence*, p. 123. In perjury there is the added complication that corroboration is required for a conviction, whereas, in a civil action—at least since *Hornal* v. *Neuberger Products, Ltd.* [1957] 1 Q.B. 247—evidence by a single witness, who satisfied the court of the truth of his allegation on a balance of probabilities, would presumably suffice. But this difficulty differs only in degree, and not in kind, from that which arises where a person is found guilty, on a balance of probabilities, in an action of deceit of acts which constitute the crime of obtaining by false pretences; and this may certainly happen: see *Hornal* v. *Neuberger Products, Ltd.* (above).

It would be interesting to know what effect the rule of absolute privilege really has; how may witnesses *know* that they are not subject to an action for defamation? It may also be worthy of consideration whether the policy would not be adequately served by a defence of qualified privilege. If a man is sent to prison as a result of perjury, he is entitled to no compensation from the State. Ought he not to be able to recover from the perjured witness? If such a change in the law were made—for which legislation would, of course, be required—most of the difficulties anticipated could be obviated by making it a condition precedent to an action that the defendant should have been prosecuted to conviction for perjury. *Cf.* the rule in *Smith* v. *Selwyn* [1914] 3 K.B. 98.

SCOTLAND

Evidence—capital murder—statement made in answer to charge of assault occasioning grievous bodily harm

See H.M. ADVOCATE *v.* GRAHAM, p. 753, *ante*.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. ATKIN the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 2, 1958) reduced a sentence of two years' imprisonment to one which would permit immediate discharge. A. had been convicted at quarter sessions of receiving goods obtained under circumstances amounting to a misdemeanour. A., who was a man of forty-eight years of age, was of previous good character. The court stated that the goods received had been obtained by fraud by A.'s fellow prisoner who, by the exercise of considerable ingenuity, had acquired property to the value of nearly £2,000. A. had acquired some of the property, but there was not a shred of evidence that he had made a penny piece out of the transactions. He was a man who took a very great interest in social welfare and the property had been passed over to his friends at the same price as he had paid. Further, it had emerged in the course of the case that upon discovering that the property had been fraudulently obtained he at once stopped having any further dealings with it; and he had been co-operative with the police. In the circumstances the sentence of two years' imprisonment was too harsh and would be varied to such sentence as would permit A. to be discharged from prison tomorrow.

In R. *v*. BROWN AND GWYNNE, the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 2, 1958) varied sentences of borstal training to sentences of six months' imprisonment. B. and G. had pleaded guilty at quarter sessions to storebreaking and stealing cutlery. Both B. and G. were young men of eighteen years of age and both had been placed on probation in October, 1957, for office breaking (twenty-three other offences being taken into consideration in B.'s case and twenty other offences in G.'s case). The prison commissioners had reported that B. was not suitable for borstal and that in G.'s case probation should be continued. The probation officer doubted if open supervision would be effective in either case. The court stated that, the present offences having been committed whilst the appellants were on probation and having regard to all the circumstances, there was no suitable sentence for these two young men other than imprisonment. They had both been earning good wages but spending a great deal of it apparently on dancing and drink, and clearly the present offence had been committed when they were the worse for drink. In the circumstances, the sentences of borstal training would be varied to sentences of six months' imprisonment.

Borstal training

In R. *v.* O'ROURKE, the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 2, 1958) varied a sentence of borstal training to imprisonment for such period as would allow immediate discharge. O. had been sentenced by quarter sessions after conviction by a magistrates' court of being a suspected person loitering with intent to steal from cars. O., who was a young man of twenty years of age, had been previously on probation for housebreaking in 1951, fined for indecency in 1957 and conditionally discharged in March, 1958, for stealing milk. The court stated that O. did not apparently wish to return to Ireland and the question was what could be done with him. He had been reported as medically fit and suitable for borstal training, but it was to be observed that the offence of loitering with intent carried a maximum of three months' imprisonment. In all the circumstances and bearing in mind O.'s previous history, this court thought that he was not suitable at this stage for borstal training and, as he had already served five months' imprisonment the proper order was that he should be discharged immediately.

Corrective training

In R. *v.* BREED, the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 2, 1958) varied a sentence of thirty months' imprisonment to one of three years' corrective training. B. had been sentenced by quarter sessions after conviction by a magistrates' court of four offences of false pretences. B., who was a man of twenty-seven years of age, had a number of previous convictions and was eligible for corrective training. Three months prior to the present conviction B. had been sentenced to twelve months' imprisonment for false pretences, and the present offences had been committed while on bail awaiting trial for the earlier offences. Passing sentence the recorder said that if it had been open to him he would have passed a sentence of corrective training but, as B. was already serving a sentence of imprisonment, he could only pass a prison sentence; and the sentence imposed was one of thirty months' imprisonment to run consecutively with the earlier sentence. The Court of Criminal Appeal stated that, following *R.* v. *Cannell* (1933) 37 Cr.App.R. 188, it was clear that there was power to pass a sentence of corrective training and accordingly the sentence would be varied to one of three years' corrective training to date from the date of passing the sentence of thirty months'.

[NOTE: The phrase in *R.* v. *Cannell*, at p. 189, " such a sentence can be made to begin only at the conclusion of the sentence which he is already serving " might be construed as meaning that the sentence of corrective training *must* be made to take effect from the conclusion of the sentence of imprisonment. The present case decides that the sentence of corrective training may also be effective from the date of conviction so that the shorter sentence merges in the larger.]

Preventive detention

In R. *v.* DOWNHAM, the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 2, 1958) refused an application for leave to appeal against a sentence of nine years' preventive detention. D. had pleaded guilty at quarter sessions to the larceny of candlesticks from a church and of a bicycle and eighty-two other offences were taken into consideration. D., who was a man of forty-seven years of age, had fifteen previous convictions of which latterly most were for the larceny of candlesticks from churches; and he had been given probation, imprisonment, seven years' preventive detention in 1950, and probation again in 1956. The court stated that this was a tragic case of a man who was the son of a clergyman, who had had a public school education and had always had a certain amount of private means. He appeared to have an irresistible impulse to steal candlesticks from churches. It had been urged on D.'s behalf that the only thing left to try was some form of medical treatment, but this man could not be left at large and the court had no power to put him into a mental institution for more than twelve months. The only course was to let the sentence rest, with the intimation that if the prison doctor thought that mental treatment would serve some useful purpose he could so report to the Home Office.

*Acts and Orders**

Animals

Certain areas in Southern England and in North, West, Central and South Scotland are declared attested areas in which, for practical purposes, all cattle are free from tuberculosis. Various previous orders, which declared parts of these areas to be attested areas and other parts to be eradication areas for the purposes of controlling tuberculosis in cattle, are revoked and replaced by the new Orders which declare the whole areas to be attested areas. The whole areas will continue to be subject (as they were under the revoked Orders) to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950 No. 2006) as amended (by S.I. 1954 No. 762; 1955 No. 1449), which provisions include amongst other things a prohibition against movement of cattle into an eradication area or attested area except under licence or on certain transit journeys. The orders revoked are 1957 S.I. Nos. 1613, 1634; 1958 S.I. Nos. 212, 213 (Scotland) and 228 and 229 (Southern England). Operative October 1, 1958. TUBERCULOSIS (SOUTHERN ENGLAND ATTESTED AREA), (NORTH, WEST, CENTRAL, AND SOUTH SCOTLAND ATTESTED AREA) ORDERS, 1958 (S.I. Nos. 1583, 1555).

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

The Fowl Pest (Infected Areas Restrictions) Order, 1956 (S.I. No. 1611) is amended, the principal changes being (a) the omission of a declaration that an Infected Area is free from fowl pest when the Order creating the area is revoked; (b) the abolition of the requirement that the Minister of Agriculture, Fisheries and Food should have published a prescribed notice before granting any licence for the movement of poultry out of an Infected Area; (c) the introduction of a provision allowing poultry intended for slaughter to be moved to a poultry slaughterhouse in an Infected Area under licence; and (d) the inclusion of an additional exemption (from the general prohibition on the holding of sales of poultry in an Infected Area) allowing farm sales under licence. Operative September 8, 1958. FOWL PEST (INFECTED AREAS RESTRICTIONS) AMENDMENT ORDER, 1958) (S.I. No. 1442).

For penalties for contravention see section 79 of the Diseases of Animals Act, 1950.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Food and Drugs

Provision is made for the compulsory use of special designations for retail sales of milk in certain areas in England and Wales. Section 41 of the Food and Drugs Act, 1955 (4 & 5 Eliz. 2, c. 16) enables the Minister of Agriculture, Fisheries and Food and the Minister of Health, after consulting such representative organisations as appear to them substantially to represent the interests concerned, to bring into operation by Order the provisions of section 37 (1) of that Act, relating to the compulsory use of special designations for retail sales of milk in any areas in England and Wales in which it is not already in operation. The representative organisations having been consulted the provisions of section 37 (1) are now brought into operation (from October 1, 1958) in the areas specified in the Schedule. MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) (No. 2) ORDER, 1958 (S.I. No. 1496).

For penalties for contraventions see section 106 of the Food and Drugs Act, 1955.

Hire-Purchase

Regulations controlling hire-purchase and credit-sale agreements and hiring agreements are amended and generally relaxed. The principal changes affecting hiring agreements are (1) the period in respect of which advance payment is required of rentals and charges for services under a hiring agreement for goods to which the Order applies is reduced from nine to four months; (2) unless the agreement is for an indefinite period it must be made for a definite period of not less than four months instead of nine months as hitherto; (3) the prohibition on any variation of a hiring agreement which would affect an advance payment made in accordance with the Order is modified to permit a variation providing for the return of that payment (or any part of it) on the termination of the agreement; (4) the exception in Article 6 (1) of the principal Order, which applies to the disposal of goods under written hiring agreements when the goods are more than three years old, is no longer subject to any other condition; (5) a reasonable allowance for any goods bought from a prospective hirer may be taken into account in calculating advance payments required by the Order. The goods to which the Order applies are specified in the Schedule. The principal changes affecting hire-purchase and credit-sale agreements are (1) the Order no longer applies to (a) goods for which the minimum deposit required was formerly 20 per cent., (b) vehicles of the description specified in heads (i)–(iv) of item 7 of the Schedule to this Order, (c) fixed and movable plant and equipment not designed for domestic use; (2) the control is now confined to the goods described in the Schedule to this Order; the minimum deposit for all such goods is now 33⅓ per cent. while the maximum period for the payment of the balance remains at 24 months; (3) the spouse of a deceased person who at the date of death was in possession of goods under a hire-purchase or credit-sale agreement may, subject to a limitation on the period for the repayment of the balance due, be in possession of those goods although he or she has not personally paid the prescribed deposit, provided that a deposit was paid by the deceased. Similar provision is made in respect of a body corporate to whom goods subject to an uncompleted hire-purchase or hiring agreement are transferred in the course of the transfer of a business. The principal Orders which are amended are the Control of Hiring Order, 1957 (S.I. 1957, No. 431) and the Hire-Purchase and Credit-Sale Agreements (Control) Order, 1957 (S.I. No. 430). Both operative September 16, 1958. CONTROL OF HIRING (AMENDMENT) ORDER, 1958 (S.I. No. 1513), HIRE-PURCHASE AND CREDIT-SALE AGREEMENTS (CONTROL) (AMENDMENT No. 2) ORDER, 1958 (S.I. No. 1512).

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

London Traffic

The London Traffic (Parking Places) Consolidation Regulations, 1957 (S.I. No. 1937) are amended, the principal charges being (1) the appointment of certain parking places in Chelsea, Lambeth, Barking and Yiewsley is revoked; (2) the limits of certain parking places in Lambeth, Wandsworth, Woolwich, Barnes, Bromley, Hendon, Reigate, Slough, Tottenham, Thurrock, Hammersmith and Willesden are altered; (3) the permitted times during which vehicles may wait in certain parking places in Hertford and Slough are altered; (4) the position in which vehicles may wait at a parking place in Ealing is altered; (5) additional classes of vehicles are permitted to use the parking place in Albert Embankment, Lambeth; and (6) new parking places are appointed in Lambeth, Acton, Camberwell, Enfield, Cheam, Tottenham, Twickenham, Thurrock, and Yiewsley. Operative September 29, 1958. LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION (AMENDMENT) REGULATIONS, 1958 (S.I. No. 1574).

The following Order has been made detailing prescribed routes: S.I. No. 1573 (Hackney).

The following Order has been made prohibiting waiting: S.I. No. 1575 (Redhill).

The following Orders have been made prohibiting cycling on footpaths, S.I. No. 1572 (Thurrock), and in pedestrian subways, S.I. No. 1509 (Surbiton).

Merchant Shipping

Provision is made for the enforcement of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. This Order (1) empowers surveyors of ships to go on board any ship to which the Convention applies while the ship is within a harbour in the United Kingdom and to require production of any records required to be kept in accordance with the Convention ; (2) applies, for the purposes of the Order and with modifications, certain provisions of the Oil in Navigable Waters Act, 1955 (3 & 4 Eliz. 2, c. 25) relating to the taking of copies of entries in such records, and their certification as true copies, and to the admissibility in evidence of such records and copies, and (3) provides for penalties for failure to comply with the requirements duly made under the Order or under the provisions of the Act applied by the Order, and for wilfully obstructing a person acting in the exercise of any power conferred by the Order or by any provision of the Act so applied. Operative September 18, 1958. OIL IN NAVIGABLE WATERS (ENFORCEMENT OF CONVENTION) ORDER, 1958 (S.I. NO. 1526).

For penalties for contravention see section 11 of the Oil in Navigable Waters Act, 1955, as modified by the Schedule to this Order.

Scotland

The use of antioxidants in food sold or imported into Scotland is regulated. The principal provisions are (1) the sale or importation of food containing antioxidant other than as specified in the First Schedule (Reg. 5 (1) (*a*) and (2)) is prohibited ; (2) it is provided that where food contains as an added ingredient any food specified in the First Schedule, that food may contain antioxidant of a description specified in that Schedule and in proportion to the quantity permitted for that ingredient (Reg. 5 (1) (*b*)) ; (3) where food contains milk fat by reason of the addition, as an added ingredient, of any dairy product, that food may, as respects its milk fat content, contain antioxidant of the description and in the proportion permitted in relation to an amount of anhydrous fat equal to the milk fat (Reg. 5 (1) (*c*)) ; (4) it is prohibited to sell or advertise for sale, with a view to its use in the preparation of food, any antioxidant which is not permitted by the regulations, and requirements are imposed as to the labelling of antioxidants and of specified foods and margarine containing antioxidant (Regs. 6 and 7); (5) it is provided that where food is certified by a public analyst as containing antioxidant not permitted by the regulations, that food may be treated for the purpose of section 9 of the Food and Drugs (Scotland) Act, 1956, as being unfit for human consumption (Reg. 8). The Regulations apply to Scotland only and do not apply to food or antioxidant intended for export. Operative September 6, 1958. ANTIOXIDANT IN FOOD (SCOTLAND) REGULATIONS, 1958 (S.I. No. 1467).

For penalties for contraventions see Regulation 9 of these Regulations.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

50. *Power to arrest without warrant on charge under section* 14 *of the Criminal Justice Administration Act,* 1914

Recently, a vagrant was sentenced by the local magistrates to twenty-eight days' imprisonment for wilful damage to the value of £2, contrary to section 14 of the Criminal Justice Administration Act, 1914.

The offender was found committing the offence and, in accordance with practice, he was arrested without warrant. Some controversy has now arisen as to whether there was, in fact, power to arrest for this offence, or whether the correct procedure should have been to obtain a warrant.

The point at issue is whether the power of arrest given in section 57 of the Malicious Damage Act, 1861, is also available in respect of a person who is found committing damage and who is subsequently dealt with under the Criminal Justice Administration Act, 1914. [L. E. W.]

ANSWER

Section 61 of the Malicious Damage Act, 1861, seems to be more appropriate than section 57, for the power of arrest given by the latter section is limited to cases of persons having committed or being about to commit any felony against the Act, whereas section 61 allows the arrest of any person found committing any offence against the Act. Section 61 requires that the arrested person shall be taken before the magistrate to be dealt with according to law, so that the fact that he is dealt with under section 14 of the Criminal Justice Administration Act, 1914, does not seem to invalidate his arrest under section 61. To be convicted under section 14 of the 1914 Act he must necessarily have committed an offence against the Malicious Damage Act. [D. W. E.]

Letters to the Editor

Insurance—Use of Combination with Sidecar Attached

Dear Sir,

I refer to the Practical Problem, at p. 705, *ante*, discussing whether the owner of a motor-cycle combination was covered by insurance when he had removed the sidecar. I agree with your answer but I think some reference should have been made to section 12 of the Road Traffic Act, 1934, which declares that so much of a policy as purports to restrict the insurance by reference to (*inter alia*) " the condition of the vehicle " or " the carrying on the vehicle of any particular apparatus " is of no effect. It might be argued that the removal of the sidecar is a matter relating to the " condition " of the vehicle but in *Higgins* v. *Feeney* (1954) 88 Ir.L.T.R. 152 it was held that a term in a policy that it did not cover use " while carrying any passenger unless a sidecar is attached to the motor-cycle " was not void under a similar Irish statute (which used the words " construction " and " equipment " and not " condition ").

It has never been decided in England whether section 12 of the 1934 Act both provides a defence to criminal liability under section 35 of the 1930 Act (use without third-party insurance) and restricts the defences which an insurance company may raise to an action on the policy or only the latter.

Yours truly,
CAMBRIAN.

The Problem of Wounding with Intent

Dear Sir,

My attention has been drawn to a misstatement in my article " The Problem of Wounding with Intent " which resulted from my use of the compendious term " grievous bodily harm with intent " instead of setting out section 18 of the Offences against the Person Act, 1861, in full. I referred on two occasions to a conviction for the lesser offence where the graver offence is charged. In the absence of an alternative count this is, of course, only possible, as the Prevention of Offences Act, 1851, s. 5 makes clear, when wounding is alleged in the graver charge.

Yours faithfully,
E. STOCKDALE,
Barrister-at-Law.

Temple.

Books and Periodicals

Book Reviews:

Stone's Justices Manual, 1958. Ninetieth edition by J. Whiteside and J. P. Wilson. London: Butterworth & Co. 1958. 2 vols. cccxxvi, 3044 and (index) 227 pp. (Thin edition 97s. 6d. net; thick edition 92s. 6d. net.)

An up-to-date edition of *Stone's* should be a part of every lawyer's library, since it contains so much information that is not readily found elsewhere, and is, therefore, particularly valuable to the man whose practice seldom necessitates his visiting the magistrates' courts. Advocates and magistrates' court clerks are, however, the most frequent users of the book. They well know its value; indeed, such is their respect for it, that experienced men often, improperly, but understandably, quote from it as an authority. It is, therefore, unfortunate that a book which, obviously, takes time and care to compile and keep up to date, should fall short of perfection because of the manner in which its contents are presented.

For *Stone's* to be of real value both to the man who uses it so infrequently that it is a strange territory to him and the flustered advocate, hurriedly leafing through its pages to meet an unanticipated argument, the book must be as compact as possible, yet contain the maximum amount of information, set out in such a way that it is easily found and assimilated.

The information about Justices and their clerks on pages 1 to 38 is of little use to the regular users of *Stone's*; of the forms and precedents set out on pages 2535 to 2637, only those that deal with appeals are of interest to the advocate, and other publications which contain the other forms and precedents are available to magistrates' clerks; such clerks are guided by Home Office letters and accounting instructions when dealing with the allocation of penalties, a subject of no value to the practitioner, who is also uninterested in the mysteries of meetings of magistrates. Thus, the information contained on pages 2641 to 2643 and 2647 to 2650 could be omitted without any loss in the value of the publication. Nor would the disappearance of the Probation Rules (pages 2711 to 2738) be regretted by many readers.

As a result of this, admittedly small, saving, additional guides to the finding of information could be inserted.

If, for publication purposes, the book must be produced in two volumes, it might be wise to abandon the present alphabetical presentation of the statutes, and group those, and their accompanying regulations, that are frequently used by advocates (for instance, material about the Road Traffic offences, husband and wife and children's disputes and the most often committed crimes) in one volume; and print the, most useful, explanatory material and infrequently used information (about burials, architects, official secrets, mines and quarries, etc.) in the other. It is, also, essential that the titles of statutes and list of cases, in addition to the index, appear in both volumes, and, although it is formally correct to have a chronological table of statutes, an alphabetical list is of much more use.

The finding of information would be easier if the statute titles and section numbers, which now appear as a part of and at the end of the text of a section, were written in a heavier type than and at the commencement of the text to which they refer, or, even better, in the margin against the first line of the text. Those who require to find a particular section would no longer have to read the chapter "backwards."

A schedule of penalties printed at the end of both volumes, similar to that which appears in Archbold's *Criminal Pleading, Evidence and Practice,* would be invaluable.

Finally, an even more detailed and comprehensive index would be welcomed by all who use the publication.

Hitherto, the format and general contents of the publication has been commented upon and it is more difficult to decide what to say, for instance, about the cases to which reference has been made: some readers opine that too many case references are inserted, but most welcome as many references as possible, so long as the size and legibility of the general text is not diminished. It is unfortunate that no reference to *R.* v. *Joyce* [1957] 3 All E.R. 623 which deals with the admissibility of "induced statements"; *R.* v. *Burgess* (1956) 40 Cr.App.R. 144, C.C.A. which contain references to the desirability of corroboration in sexual offences; and *R.* v. *Craske, ex p. Metropolitan Police Commissioner* [1957] 2 All E.R. 772 wherein the right to elect for trial is considered, but, so many other, well chosen, cases, have been inserted that to continue to list those that have been omitted would cause people who do not know *Stone's* to underestimate its value.

Not all the suggestions contained in this review are the writer's own; many were made by other regular purchasers of *Stone's*, all of whom considered the publication so valuable that they readily gave time and thought to devising means of making it an even more useful "tool of their trade." No greater recommendation could be given to any legal text book.

BRIAN FRASER HARRISON.

Crimes Discreetly Veiled. By F. J. P. Veale. London: Cooper Book Co. 1958. 237 and (index) 4 pp. (15s. net.)

It has been evident for some time that there has been a feeling of disquiet in the minds of some of the world's jurists over that comparatively recent development, the "war criminal." Some of the strange acts and peculiar procedure that took place at Nuremburg and elsewhere under the guise of international law certainly gave food for thought.

Mr. Veale's book is an examination of certain of these items of contemporary history, which he suggests have been concealed, forgotten or intentionally obscured by wartime propaganda. As he suggests, in these days of Cyprus, Kenya and Malaya, one is apt to regard the activities of "partisans" in a slightly different manner to the enthusiasm of the war days.

It is a great pity that the author was not better served by his proof reader and his publisher. The book is poorly printed on inferior paper and there seems a doubt at one time whether the ink will hold out to the final page. Again, we have on the opening page an indice, which is obviously intended for the foot of the page, but appears in the middle. Small spelling and printing errors occur throughout.

This poor production is symptomatic of a book which would have been considerably improved by further examination, before it saw the light of day. In that way, such irritating repetitions as the constant reiteration of the figures of the heads that rolled in France after the "liberation" might have been eradicated or, at least, the same figure used.

Similarly, the author might have had second thoughts about all those rhetorical questions, which appear to be so unnecessary; or those rather childish colloquialisms, which do nothing but annoy. One might also have hoped that, having told us it was not necessary to tell us something, he would not have spent several pages in doing just that.

It is this evidence of careless writing and unnecessary padding which spoils a book which may well have had something worthwhile to say. Cut by at least a third and judiciously corrected, what has been said might be worth reading.

HUGH DUDLEY.

Murder Parade. By Judge Gerald Sparrow. London: Robert Hale. 188 and (index) 2 pp. (16s. net.)

In his opening chapter, Judge Sparrow confesses that he has been fascinated by the subject of murder since his school days. This fascination has led him to collect together a wonderful miscellany of murder stories, some of which appear to be original and not to have been told before.

He is to be congratulated on the consideration he shows his reader by a note appearing above Chapter 1, which warns that this is simply a preliminary ramble and does not contain any particular murder story. It is to be hoped that this warning will not encourage anyone to ignore this thoughtful preamble, intriguingly entitled "Malice Aforethought." In it, he has some forceful and thoughtful remarks to make about the amalgamation of the two branches of the legal profession and the absence of a Criminal Code in this country. Again, his story of the influence of Queen Victoria on the M'Naughten Rules is an enlightening one.

Considering the originality of much of the material, it seems a pity that such a hackneyed story as that of Madeline Smith should have been included. It really is time that this story like its victim and its heroine was decently interred. Not all of his readers will agree with Judge Sparrow's comments on the Timothy Evans case or for that matter on that of the South Coast doctor.

He also seems a little cruel when dealing with the Liverpool Police in the case of Wallace, when he suggests that as the police were in a predicament and as there was no one else to arrest, they decided to arrest Wallace. It is hardly to be credited that even in 1931 such considerations weighed in deciding whether the case against a suspect was strong enough to warrant proceedings. If so, the Director of Public Prosecutions must find himself with some strange cases from Merseyside.

But these are minor points. This is a book full of interest and written with a lively humour. It is significant to find a lawyer of Judge Sparrow's wide experience and intelligence, appreciating though he does the danger of an innocent man occasionally being hanged, still very firmly in favour of capital punishment.

In his foreword, the author tells us that his next book will tell of the great forgers. He is assured of at least one reader, who will await its publication date with pleasurable anticipation.

HUGH DUDLEY.

Great Detective Exploits. By Leonard Gribble. London: John Long. 1958. 223 pp. (16s. net.)

Although Mr. Gribble has an imposing list of titles to his credit, this reviewer must confess that this is his first acquaintance with the author's work.

For his latest book, this well-known crime writer has taken fifteen examples of the work of criminal investigation from various parts of the world. The United States and England supply three each and the remainder come from such assorted countries as Austria, Australia, Belgium, Canada, India and Roumania.

The differing techniques employed in these various countries at varying periods are an interesting study. Whilst obviously there is more scope for the individual detective where the laws of the country permit an arrest first and the necessary acquisition of evidence second, in all of these stories there is an undoubted example of good detective work.

The stories are not spoilt, as so often happens in works of this kind, by over-dramatisation or any over-enthusiasm on the part of the author. Mr. Gribble is content to tell the story in a sensible manner and let the facts speak for themselves without indulging in any high-flown flights of fancy.

It is a pity that in two stories he never does tell us the period, and that in another, we are half-way through the story before we learn the name of one of the central characters. These remarks may appear carping in writing of a book which passed a very pleasant hour.

One of Mr. Gribble's three stories from England is a rather incomplete account of the London Airport bullion raid. Although not wishing to increase the flood of Scotland Yard reminiscences, it would nevertheless be fascinating to read the whole of this intriguing story sometime!

HUGH DUDLEY.

Books Received:

Cases in Criminal Law. 2nd ed. By J. W. Cecil Turner and A. H. Armitage. Cambridge University Press. 1958. 683 and (index) 6 pp. (60s. net.)

Advocates of the Golden Age. By Lewis Broad. London: John Long. 1958. 274 and (index) 8 pp. (21s. net.)

The Results of Probation. English Studies in Criminal Science, edited by L. Radzinowicz. London: Macmillan & Co. 1958. 112 pp. (21s. net.)

Coroner's Practice. By Gavin Thurston. London: Butterworth & Co. 1958. 171 and (index) 9 pp. (21s. net.)

According to the Evidence. By Gerald Abrahams. London: Cassell & Co. 1958. 241 and (index) 6 pp. (21s. net.)

Spies and Informers in the Witness Box. By D. N. Pritt, Q.C. London: Bernard Harrison. 1958. 96 pp. (8s. 6d.)

The Book for Police. By Alan Garfitt, LL.B., Barrister-at-Law. London: Caxton Publishing Co., Ltd. 1958. 5 vols. 1. English Legal System, Police History, Organisation and Practice, Criminal Law, 470 pp. 2. Administrative Duties and Sanctions, 375 pp. 3. Road Traffic Law, Evidence, Criminal Procedure, 571 pp. 4. General Information, Legal Terms, Medical Terms, First Aid, 468 pp.; Index, 51 pp.; Tables, 17 pp. 5. World Atlas, International Police Communications. (£12 17s. 6d. net.)

Readers' Digest:

False pretences: 226 *Law Times* 125.

Imprisonment: Restrictions on the imposition of imprisonment: 226 *Law Times* 141.

Murder: Defence of insanity or diminished responsibility: 102 *Solicitors' Journal* 682.

Road traffic: Dangerous and careless driving: 66 *Police Review* 602, 616, 634, 660, 672, 690.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

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Editorial

Crime and punishment: the Government view

The subject of crime was considered in both Houses of Parliament during the debate on the Queen's Speech at the opening of the new Session. The passage from Her Majesty's Speech which was under consideration was as follows:

> " My Government view with gravity the increase in crime. In the light of the most up-to-date knowledge and research they will seek to improve the penal system and to make methods of dealing with offenders more effective."

In the House of Lords the Lord Chancellor, Viscount Kilmuir, was called upon to consider two aspects of the subject. First, in answer to questions as to how knowledge of the subject was being acquired, he referred to the Ingleby Committee on the treatment of juvenile offenders, and to the Streatfeild Committee which is considering arrangements for bringing offenders to trial and for providing the courts with the information which will enable them to select the most appropriate treatment for offenders. Secondly, the House had expressed itself concerned as to the deployment of police personnel and the use of modern equipment in the prevention and detection of crime; this concern would be expressed to the Home Secretary.

Finally, the Lord Chancellor said that the real problem went much deeper; the increase in crime was due to a real deterioration in the moral and spiritual aspects of life. What was necessary was the restoration of spiritual values and the provision of some place where young people could work off their high spirits and energy.

In the House of Commons, the Home Secretary, Mr. R. A. Butler, began his review of the subject on the same note as that on which Viscount Kilmuir had ended. Speaking of the deep disorder in society, Mr. Butler said that Britain now has half as much crime again as before the war. The increase in the number of sexual offences, particularly against children, was disturbingly high.

Of particular concern was the high rate of crime among young men between 16 and 21 for offences for all kinds. Children under 17 had a bad record, but it was encouraging to see that children under 14 had a better record than those who were now, as adults, causing such anxiety.

The part that the Government could play was limited. The roots of crime lay deep in society. A moral basis of behaviour could no more be imparted by the Government than could a religious belief. Belief in moral obligations, pride in integrity and respect for the rights of others could and should be instilled by the family. There was a big responsibility on schools, teachers, churches, families and any others who could help to produce a moral behaviour among the young which would lead to their becoming good citizens. The present-day tolerance of minor dishonesty and the reluctance to accept positive responsibility for the moral training of children was very disturbing.

Dealing with the steps against crime which the Government could take Mr. Butler dealt with the following subjects.

Police. There were still some deficiencies in police strength, particularly in urban areas including London. Most county and borough forces were up to full strength. Particular attention was being given to the training of future leaders: it was now recognised that the service should find its chief officers from its own ranks. Spectacular developments in the use of wireless and of motor transport had been made. There had never been a better spirit and he would be addressing the Police Federation on pay and conditions in the near future.

Research. The Home Office research unit was now well established and with the establishment of the Institute of Criminology at Cambridge it would be possible to back up the work of the police and others with adequate knowledge.

Sentences. Mr. Butler did not think that the courts needed to be compelled to pass heavier sentences. They had adequate powers to pass heavy sentences and, in fact, the average sentences for 1956 in cases of violence, sexual offences and breaking and entering were higher than those imposed some 20 years before. It was a fundamental principle of the constitution that the executive did not interfere with the judiciary.

Future legislation. The Streatfeild Committee had been set up to investigate the best methods of assisting the courts to make the punishment fit the criminal as well as the crime. He did not intend to give a full picture of what was in his mind for the future. This he hoped to place before the House in the most convenient form in the next month or two. He did not consider that early legislation was advisable: public opinion would have to be tested first and the authority and guidance of those engaged in the administration of justice obtained. He could, however, indicate some lines of approach.

In the case of adult offenders existing methods had still to be extended. All the provisions of the Criminal Justice Act, 1948, had not yet been tested fully and it would be wrong to say that the system had failed. In fact, the figures showed some successes, particularly with open prisons.

For the future, adequate means must be provided for dealing with the prisoners as individuals. Classification must be more precise and the present grouping together of prisoners of all kinds must cease. This involved a determined programme of building on a considerable scale.

Where young offenders were concerned elasticity of judgment and diversity of treatment were necessary. More discretion should be left after sentence was passed to the Prison Commissioners, Borstal Governors and others to handle young people as suited their nature.

While these comments of the Home Secretary are framed in very general terms it is abundantly clear that Mr. Butler will continue to pursue his present policy of informed and enlightened reform. It is equally clear that neither he nor the Government can be driven back to the old-fashioned and often ineffectual " deterrent " punishments such as flogging. Mr. Butler has declared that he will not turn back the clock.

Appeal to the Court of Criminal Appeal

It is only in very rare cases that the Court of Criminal Appeal will reconsider an application for leave to appeal after it has once been dismissed. In *R.* v. *Williams*,[1] however, such an application was relisted because of a representation by the appellant that his application had not received proper consideration and that the adjournment for which he had asked in a letter of twelve pages, received the day before the court sat, had not been granted. Cassels J., giving judgment, said that on the original hearing of the application the three judges had read the shorthand transcript and had before them all the communications from the appellant including the letter of twelve pages. The case was so plain that the appellant's request for the adjournment had not been granted and his application for leave to appeal had been refused. Upon further consideration the court still saw no reason for interfering and dismissed the application.

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[1] Court of Criminal Appeal: Lord Parker C.J., Cassels and Streatfeild JJ.: *The Times*, October 14, 1958.

Soliciting by men

A problem which has in recent years become acute in many large towns is that of the man who persistently annoys women by soliciting them for immoral purposes. The most usual method of dealing with these persons appears to be to charge them with insulting behaviour likely to cause a breach of the peace, contrary to section 5 of the Public Order Act, 1936, the maximum penalty for which is 3 months' imprisonment and/or a fine not exceeding £50. It is, however, possible, and the Chief Constable of Plymouth has announced his intention of so doing,[2] to charge such persons under section 32 of the Sexual Offences Act, 1956, under which section it is an offence to " persistently solicit or importune in a public place for immoral purposes." The maximum penalties in this instance are six months' imprisonment if the case is tried summarily or two years' imprisonment if the case is tried on indictment. The section is more often used against men soliciting for the purpose of homosexual relations, but there is no reason why it should not be used against men soliciting women and, in fact, the corresponding Scottish provision has been invoked for this purpose.

Criminal Case and Comment

Readers have from time to time praised the usefulness of " Case and Comment " published in this *Review* and have suggested the separate issue of these case reports. As a result of these suggestions we shall publish in the New Year a volume of case reports called *Criminal Case and Comment*.

This volume will contain short reports of the cases which have been published in this *Review* this year. The cases will be arranged in alphabetical order under their appropriate headings. This new volume will not be just a reprint from the *Review*; every report will be reconsidered and account will be taken of any full reports subsequently received.

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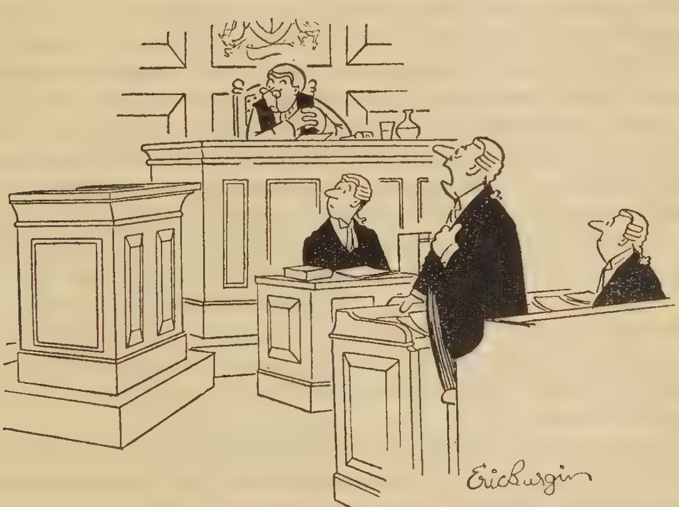
[2] 122 *Justice of the Peace* 744.

Professor J. C. Smith is editor of the reports and he will reconsider the commentaries written, amplifying these where necessary.

In addition the necessary statutory references will be quoted in full. Full tables of cases, statutes and orders will be published together with an index.

Criminal Case and Comment for 1958 will be a year book of cases for all whose daily business is the criminal law. It will be sold to present subscribers at the reduced price of 12s. 6d., for others the price will be 17s. 6d. An order form will be found facing p. 773.



" You are retained by the Cragmarket Racing Stables as a jockey, are you not?"

The New Law of Provocation

Ruth Ellis and Ernest Jan Fantle—A Study in Contrasts

By J. P. Eddy, Q.C.

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.—Section 3, Homicide Act, 1957.

Until the passing of the Homicide Act, 1957, which transformed it, few topics in the field of criminal law had given rise to more discussion than that of provocation in relation to a charge of murder.

There were cases going back to the seventeenth century in which various aspects of the problem were considered. Blackstone's *Commentaries*, Hale's *Pleas of the Crown*, Foster's *Crown Cases* and other authoritative works all made their respective contributions. From these one principle at least clearly emerged: that where a person killed another by means of a deadly weapon mere words or gestures were not enough to reduce the offence from murder to manslaughter. It was necessary, in general, that the provocation should take the form of a physical attack. But in former days it was not difficult to satisfy this condition. Thus in the reign of Charles II—to take an example given in Kelyng's *Reports of Cases* in *Pleas of the Crown* at p. 135—pulling a man by the nose was held sufficient provocation to reduce a killing from murder to manslaughter. The one exception to the principle was the discovery of a spouse in the act of adultery. But a mere confession of adultery was not enough.

In recent times the House of Lords did much to clarify the law. There was the case of *Woolmington* v. *The Director of Public Prosecutions* [1935] A.C. 462. In that case Lord Sankey L.C. said that when dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It might prove malice either expressly or by implication. For malice might be implied where death occurred as the result of a voluntary act of the accused which was (i) intentional and (ii) unprovoked. When evidence of death and malice had been given (this was a question for the jury) the accused was entitled to show, by evidence or by examination of the circumstances adduced by the Crown, that the act on his part which caused death was either unintentional or provoked. If the jury were either satisfied with his explanation or, upon a review of all the evidence, were left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner was entitled to be acquitted.

The Test to be Applied

Then there was the case in 1941 of *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, where Lord Simon L.C. said that it was not all provocation that could reduce the crime of murder to manslaughter. To have that effect provocation, he said, must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he committed the act which caused death. The test to be applied was that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual was not entitled to rely on provocation which would not have led an ordinary person to act as he did. His Lordship went on to say that in applying the test it was of particular importance (a) to consider whether a sufficient interval had elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, was a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

"*Time to Cool*"

Then in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, the House of Lords had the opportunity of dealing with provocation by "mere words." Lord Simon said in dealing with provocation as justifying the view that the crime might be manslaughter and not murder, a distinction must be made between what the judge laid down as matter of law and what the jury decided as matter of fact. If there was not sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which meant a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produced the death, it was the duty of the judge as matter of law to direct the jury that the evidence did not support a verdict of manslaughter. If, on the other hand, the case was one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it was for the jury to determine whether on its view of the facts manslaughter or murder was the appropriate verdict. It was hardly necessary to lay emphasis on the importance of considering, where the homicide did not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had " time to cool."

The whole doctrine relating to provocation, said his Lordship, depended on the fact that it caused, or might cause, a sudden and temporary loss of self-control whereby malice, which was the formation of an intention to kill, or to inflict grievous bodily harm, was negatived. Consequently, where the provocation inspired an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation might reduce murder to manslaughter seldom applied. Only one very special exception had been recognised, *viz.*, the actual finding of a spouse in the act of adultery. This had always been treated as an exception to the general rule. But it had been rightly laid down that the exception could not be extended. " Even if Iago's insinuations against Desdemona's virtue had been true, Othello's crime was murder and nothing else."

Provocation by " Mere Words "

Lord Simon went on to deal specifically with provocation by " mere words." It was not necessary in that appeal, he said, to decide whether there were any conceivable circumstances accompanying the use of words without actual violence which would justify the leaving to a jury of the issue of manslaughter as against murder.

" It is enough to say," said his Lordship, " that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly."

The Case of Ruth Ellis

Such was the law of provocation when on April 10, 1955—two years before the passing of the Homicide Act—Ruth Ellis committed the murder of which she was convicted at the Central Criminal Court in London on June 21, 1955, and for which she was executed at Holloway Prison. But it does not seem to me that on the question of provocation the Act would have made any difference in her case.

Ellis, a model, aged 28, had been living with a racing driver named David Blakely at Egerton Gardens, Kensington. The man was apparently trying to part from her, and on Easter Saturday he went to some friends at Hampstead. The next night Ellis, armed with a revolver, hired a taxi and drove to Hampstead—a distance of several miles—and there, without a word, shot and killed Blakely. Ellis apparently fired four shots.

Her Own Story

This is Ellis's own story of what happened, told in a statement to the police—

" David did not come home on Saturday. . . . I took a gun which I had hidden and put it in my bag. . . . I intended to find David and shoot him. I took a taxi to Tanza Road. . . . I dismissed the taxi and walked down the road to the nearest pub where I noticed David's car outside. I waited until he came out with a friend. . . . David went to his car and opened it. I was a little way away from it. He turned and saw me, and then turned away from me. I took the gun from my bag and shot him. He turned and ran a few steps round the car. I thought I had missed him, so I fired again. He was still running and I fired a third shot. I do not remember firing any more, but I must have done."

In the witness box at the Central Criminal Court Ellis said she had occasion to complain of Blakely's conduct with other women. She had a peculiar idea she wanted to kill Blakely.

One Question in Cross-Examination

Mr. Christmas Humphreys, for the Crown, put only one question in cross-examination.

" When you fired that revolver at close range into the body of David Blakely what did you intend to do?"

" It is obvious when I shot him I intended to kill him," replied Ellis.

A psychiatrist called for the defence said that Ellis both hated and loved Blakely. She was suffering from some degree of emotional immaturity.

Mr. Justice Havers ruled that there was not sufficient material, even on a view of the evidence most favourable to the accused, to support a verdict of manslaughter on the ground of provocation.

In view of that ruling Mr. Melford Stevenson, Q.C. (now Mr. Justice Stevenson), for the defence, said that he could not with propriety address the jury at all, because it would be impossible for him to do so without inviting them to disregard his Lordship's ruling.

His Lordship then briefly directed the jury as indicated by Lord Simon in *Holmes's* case, and the jury, after an absence of twenty-three minutes, convicted the accused. There was no appeal to the Court of Criminal Appeal.

Ruth Ellis's Revolver

I have seen and handled the revolver which Ellis used to shoot Blakely. It is a somewhat large, heavy weapon, and her statement that she put it in her bag when she went out in a taxi to find Blakely is to me a matter for some surprise. She left her home in Kensington intending to kill, and though she travelled several miles, with ample " time to cool," she deliberately shot at and killed Blakely. I cannot see, therefore, having regard to what Lord Simon said in *Holmes's* case about the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused had " time to cool," how section 3 of the Homicide Act, if it had been enacted at the time, could have availed her.

The Case of Ernest Jan Fantle

By way of contrast, consider the case of Ernest Jan Fantle, aged 54, a courier, of Kingsgate Castle, Broadstairs, who was found Not Guilty at the Central Criminal Court on September 25, 1958, of the capital murder of Horace Stanley Lindsay, aged 50, at Arlington House, Arlington Street, London, on July 19, but guilty of manslaughter, and sentenced to three years' imprisonment.

Mr. Christmas Humphreys, for the prosecution, told the jury (*The Times*, September 26) that Fantle had been married for sixteen years, and he had a son aged about fourteen. Lindsay was a dress manufacturer, with a house at Broadstairs and a flat at Arlington House. In July, 1957, Mrs. Fantle met Lindsay, and thereafter, according to the defendant, his marriage had not been as it was before. In May, 1958, the wife said she was infatuated with

Lindsay, and could not go on living with Fantle any longer. That caused the defendant considerable distress.

In a statement to the police the defendant described how he purchased a revolver and some ammunition in Switzerland. He tried to make an appointment to see Lindsay, but the man said he was too busy. In the end an appointment was made for July 19, and on the morning of that day Fantle called at Lindsay's flat.

" Why did you buy the revolver? " asked Mr. Victor Durand, Q.C., defending counsel, when Fantle was in the witness box at the Central Criminal Court.

" I intended to kill Lindsay," replied Fantle. " I felt very insecure against this man, who had all the power against me. He held all the trumps. I could not do a thing. My wife was infatuated with him. I wanted something to strengthen me. I felt safer having some sort of moral support against that man."

Fantle said that he arrived early for the appointment. He walked round the block from eight to ten times (a half-hour), realised that shooting would not solve anything, and abandoned his intention to kill before entering the flat.

Asked what he felt when he went into Arlington House, Fantle replied: " I did not think of the weapon in my pocket at all. I was thinking about the conversation I was going to have with him about the child. My main thought was the boy. Lindsay was sitting in a chair. He was in a light jacket ready to go away. . . . I asked him straight about the child and about the future of the boy. I remember Lindsay saying he would have a good education, and I would be able to see him sometimes."

" Treated me like Dirt "

" The conversation suddenly turned to my wife. I asked him why he took her away from me. He treated me like dirt, shrugging his shoulders. He said she was going after him. . . . He stood up and showed me the door. . . . The first thing I remember then was the servant screaming 'I knew it would happen, I knew it would happen.' I smelt cordite in the room, and I asked her to get an ambulance and the police. I threw the gun on the sofa and walked out through the door."

The prosecution, with impressive fairness, did not challenge the defence of provocation, for no attempt was made in cross-examination or by way of a closing speech to destroy it. The onus of proving absence of provocation being on the prosecution once this defence was raised (*Woolmington's* case, *supra*, and see *R.* v. *McPherson* (1957) 41 Cr.App.R. 213), the verdict of the lesser crime was inevitable.

Salmon J., in sentencing Fantle, said: "The serious provocation you received from the dead man has reduced your crime from murder to manslaughter, but, as you must realise, this is still a very grave crime. Whatever provocation a man may receive—and I understand how much you received—it is no excuse for taking a gun and shooting four times at the man and killing him. That sort of conduct is to be severely discouraged."

No question arose in the *Fantle* case as to the effect of section 3 of the Homicide Act, 1957. Yet it was the sheet anchor of the defence. The jury were entitled to take into account, and, one may assume, did take into account, the whole of the provocation which Fantle had received—"everything both done and said according to the effect which, in their opinion, it would have on a reasonable man"—going right back to the commencement of Lindsay's association with Fantle's wife. Two telling phrases were used by Fantle in the witness box in describing the provocation immediately prior to the shooting—"He treated me like dirt, shrugging his shoulders. . . . He stood up and showed me the door."

In such a case there is no burden on the accused to establish provocation. If the jury are left in reasonable doubt whether, even if his explanation be not accepted, the act was provoked, he is entitled to be acquitted. (See Lord Sankey's statement of the law in *Woolmington's* case, *supra.*)

A Reasonable Man

It is to be observed that section 3 of the Act of 1957 provides that the test to be applied is that of the effect of the provocation on a reasonable man. It was the test indicated by Keating J. at the Central Criminal Court in *R.* v. *Welsh* (1869) 11 Cox's Criminal Law Cases, 336, at p. 338, and by the Court of Criminal Appeal in *R.* v. *Alexander* (1913) 9 Cr.App.R. 139 and in *R.* v. *Lesbini* [1914] 3 K.B. 1116, to which Lord Simon referred with approval in *Mancini's* case (*supra*).

This test was again laid down by the House of Lords in *Bedder* v. *Director of Public Prosecutions* (1954) 38 Cr.App.R. 133. In that case the appellant who, as he knew, was sexually impotent, attempted in vain to have intercourse with a prostitute. She jeered at him, and attempted to get away, and when he struggled, she punched and kicked him. The appellant then stabbed her with a knife, and killed her. The House of Lords (Lord Simonds L.C. and Lords Porter, Goddard, Tucker and Asquith) held that, in determining whether there had been provocation sufficient to reduce the crime from murder to manslaughter, the test to be applied was the effect of the alleged provocation on the mind of an ordinary reasonable man, and, in applying this test, it was not right notionally to invest the hypothetical ordinary reasonable man with the physical peculiarities of the person charged.

In *Bedder's* case reference was made to *R.* v. *McCarthy* [1954] 2 Q.B. 105, where the Court of Criminal Appeal held that there is " no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication."

©

J. P. Eddy

1958

Forfeiture under the Customs Laws

By D. W. ELLIOTT, LL.B., *Solicitor*
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The Bradley Case

In *Commissioners of Customs and Excise* v. *Jack Bradley* (*Accrington*), *Ltd.*[1] the defendant company, which owned and operated a fleet of lorries, used as fuel an economical mixture of diesel oil and kerosene. Kerosene is exempt from excise duty while used for domestic or agricultural purposes, but is dutiable if used for the purposes of motor transport. Because no duty had been paid on the kerosene in this case, the company was convicted of and fined for using undutied kerosene, and the mixture of kerosene and diesel oil was forfeited. Not content with this, the Commissioners commenced proceedings in the Queen's Bench Division for condemnation of all eight lorries in which the fuel had been used. They based their claim on section 277 (1) of the Customs and Excise Act, 1952, which provides " . . . where any thing has become liable to forfeiture under the customs or excise Acts . . . any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable . . . shall also be liable to forfeiture." The Commissioners argued that the lorries had been " used for the carriage of " the kerosene, and so were themselves liable to forfeiture. Lord Parker C.J. accepted this argument and condemned the lorries.

Criticism

With respect, the construction placed by the Lord Chief Justice on the words " used for the carriage of " seems rather an odd one. The plain meaning of the statutory words must be taken, but they take their meaning from their context, and anyone looking on the subsection as a whole cannot fail to be aware that it has a very strong context indeed. Surely what the draftsman is thinking of is the forfeiture of the *means used* by the evader of duty in his nefarious scheme; the juxtaposition of the words " carriage," " handling," " deposit " or " concealment " forcefully suggests that what is to be forfeited is the chest in which the contraband goods are buried, the car in the tyre of which the contraband is conveyed through the customs, the " four and twenty ponies trotting through the dark." It is the horse which carries the undutied consignment of bridles which is to be forfeit, not the horse which merely wears one of the undutied bridles. Even if one is not led to this conclusion by a consideration of the wording of the subsection as a whole, it may be argued that to say that a horse is " used for the carriage of " its bridle is using English in a very odd fashion indeed. To give to an expression a meaning which involves convicting the speaker of an inelegant and bizarre use of the English language, is not, it is suggested, giving the expression its plain meaning; especially if there is an alternative meaning which would not convict him of uncouthness.

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[1] *The Times*, October 30, 1958.

Possible consequences

Moreover, the adoption of the construction favoured by the court seems to involve one in the proposition that direr penalties are to attach to the using of those uncustomed goods which happen to form part of the equipment of a ship, aircraft, vehicle or animal, than to the using of articles which are not part of such equipment. Use an uncustomed saddle or motor tyre or anchor in the way in which such articles are normally used, and one runs the risk of losing, as well as the article, the horse, the car or the ship. Use an uncustomed wristlet watch or jewellery, and the only thing liable to be forfeited is the chattel itself, unless, indeed, one happens to take a ride on a horse, or in a vehicle, ship or aircraft, when the horse or vehicle, etc., is " used for the carriage of " the goods and becomes liable to be condemned as forfeited.

This last thought leads to others, more alarming. If a smuggler comes into this country by plane or ship, and has with him the goods he is attempting to smuggle, it seems clear that " use has been made of the plane or ship to carry " the goods in question. This is certainly so if he secretes the article about the plane or ship, and, if the construction favoured by the Lord Chief Justice is the right one, it is also so if he merely has the article with him while on the plane or ship. The knowledge or lack of it of the owner or operator of the plane or ship seems to be immaterial, as there are no words limiting forfeiture to means of transport under the control of the person who intends to evade duty. In the case of ships there is an upper limit of 250 tons, over which the ship cannot be seized unless it is much more substantially used for the offence [2];

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[2] s. 278 provides that ships of 250 tons or over are not liable to forfeiture under s. 277 unless the offence was substantially the object of the voyage, or was committed during chase.

so that the S.S. *United States* cannot be seized for the offence of one of its passengers. However, no such limit applies in the case of aircraft, so that section 277 provides a capital means of ensuring the supremacy of the Comet IV on the Transatlantic Route. Let all Boeings upon which smugglers are found to have travelled be henceforth seized and forfeit!

It is to be hoped that this curious construction adopted in the *Bradley* case will be held by some higher tribunal to be erroneous. If it is, some of the alarming thoughts expressed above will turn out to have been unjustified. Even so, the case will still have served a useful purpose in directing attention at what appears to be a truly remarkable forfeiting power. Even if " used for the carriage of " is limited as suggested to mean " used in some way to avoid the payment of duty," the part of the 1952 Act in question still seems capable of producing unjust and surprising results.

Let us suppose that A lends his car to B for a holiday abroad and, unknown to A, B attempts to re-enter England with dutiable articles hidden in the upholstery. B is caught and punished, and the car is seized as being liable to forfeiture. The questions now for consideration are: (i) is A's position helped by his complete innocence of any complicity in B's offence? ; (ii) will he be given any opportunity of making representations before forfeiture and sale? ; (iii) if he is given such an opportunity are there any representations which he can usefully make? ; and (iv) if the car is condemned and then sold to P, can A pursue any remedy against the car in P's hands?

(i) Since the statute says baldly that any vehicle which has been used for the carriage of the goods in question is liable to be seized and forfeited, the fact that the vehicle was not being operated or controlled by the owner is quite irrelevant, as is the fact that the owner was completely without knowledge of its use. It would be hard enough if the statute made the owner liable to suffer if the extent of his ignorance was that the goods which he knew were being carried were contraband; but ignorance of the fact that it was being used for the carriage of anything does not save him, nor, even, does ignorance of the fact that the car was being used at all. Even if B had stolen the car from A, it would appear to make no difference.

(ii) Section 275 (5) provides that the Seventh Schedule shall have effect for the purposes of forfeiture or of proceedings for the condemnation of any thing as being forfeited under the customs and excise Acts. The Seventh Schedule contains machinery for enabling the owner of a thing to avoid the forfeiture which at first sight appears quite effective, but which further examination reveals to be little more than a sham. The Commissioners are required to give notice of seizure, and the grounds therefor, to any person who to their knowledge was an owner or one of the owners; but they need not do so if the seizure was in the presence of the offender, or the owner or his agent, or, in the case of a ship or aircraft, the master or commander (para. 1). In our hypothetical case if the seizure was in the presence of B, as it would be, no notice need be given to A. Indeed, it appears that only in exceptional circumstances will the notice have to be given, since the offender will usually be present. Any person claiming that any thing seized as liable to forfeiture is not so liable shall within one month of notice, or if no notice was given him, within one month of seizure, give notice of claim (para. 2). If no notice is so given, or if the notice is irregular, then at the expiration of the month the thing shall be deemed to have been duly condemned as forfeited (para. 5). No condemnation proceedings are necessary, and the Commissioners are in a position akin to that of a plaintiff obtaining judgment in default of appearance. This would not be unreasonable were it not that the requirements for giving notice to interested parties under para. 1 are unduly lax; but as it is, there is a strong possibility of injustice even to a person who has a case for saying that no liability to forfeiture arose.

Assuming that the claimant has given his notice of claim in the proper form and in the prescribed time, the Commissioners must commence condemnation proceedings, either in the High Court or before justices (para. 6). In these proceedings, the claimant or his solicitor must make oath that the thing was the property of the claimant at the time of the seizure, and, in the High Court, security for costs must be given (para. 10 (1) and (2)). What is meant by " the property of the claimant " is not stated; but it does not seem wide enough to cover all interests, limited or otherwise, in the thing. If A in our example had possession of the car by virtue of a hire-purchase agreement with X, both A and X would have a substantial interest in the fate of the forfeited car, but it does not appear that both can say that the car is their property. If " property " is used in the sense in which it is normally used as meaning a thing which is owned, then the bailor X would appear to be able to say that it is his property. But if the word is used in the sense found in the law of larceny, then the thing is the property of the possessor, *i.e.*, the bailee A, or perhaps the sub-bailee B. If X had let the car on hire purchase to A, who (rightfully) hired it to B for reward for a month's tour of the

Continent, it seems unlikely that each of these persons can make oath that at the time of the seizure the car was his " property," yet each has a substantial interest which he should be allowed to defend.

If the requirements of para. 10 (1) and (2) are not complied with, the court shall give judgment for the Commissioners (*ibid.*, sub-para. (3)), without hearing the merits of the case.

(iii) Even if the claimant, by diligence and good luck, succeeds in getting the case heard on its merits, the only question for the court is whether the thing was rightly seized. Para. 6 provides that if the court finds that the thing was at the time of seizure liable to be forfeited, the court shall condemn it as forfeited. There are no other relevant factors to be considered, such as the innocence of the owner, and the court is given no discretion to grant anything in the way of equitable relief. If A cannot deny that the vehicle was used for the carriage of goods liable to be forfeited, he can only throw himself at the feet of the Commissioners, who by section 288 have a discretion to remit the forfeiture on such terms as they think fit.

(iv) It only remains to add that the condemnation order is a judgment *in rem*, and if A brought action against P he could be met by a plea of estoppel *per rem judicatem*. The order binds all the world; it is conclusive and so alters the property that trespass will not lie even at the suit of an owner who did not know of the forfeiture: *Scott* v. *Shearman*.[3] According to Blackstone J., in that case, seizure is notice to the owner, who is deemed to know whatever becomes of his own goods. Presumably, by virtue of para. 5 of the Seventh Schedule, the position is the same if no claim is made in time, when the thing shall be deemed to have been duly condemned as forfeited.

Origin and nature of the power

As appears from the date of *Scott* v. *Shearman*, this forfeiting power is by no means a new one. Ever since 3 & 4 Will. 4, c. 53, the power and the procedure to be followed have been cast in terms which have remained substantially unchanged by successive Acts up to and including the Customs and Excise Act, 1952. The only changes of any importance are that until the 1952 Act, the justices appeared to have a discretion whether to condemn or not, and since 1949, the operation of all customs Acts have been made equally applicable to aircraft.[4]

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[3] (1775) 2 Wm.Bl. 977.

[4] Air Navigation Order (S.I. 1949, No. 349).

Nevertheless, in spite of, or perhaps because of its antiquity, it is time to consider whether the power, in its width of scope and its severity, is not more than the Commissioners can reasonably ask for the due discharge of their functions. No doubt such miscreants as those who render sparkling any sweets, without a licence,[5] or indulge in the heinous practice of grogging,[6] are desperate fellows who must at all costs be deterred from pursuing their anti-social activities. No doubt a case can be made for the retention of condign punishments, redolent in their Draconian severity of the more robust age from which they date. But need those punishments be applied to persons who are not implicated in the offence in any way? It would be a different matter if absence of reasonable care in the owner was a condition precedent of liability to forfeiture; or even if the onus of showing that he did not conduce or assent to the offence was placed on him. Then some case for visiting him with forfeiture could be made on the ground of expediency if not of justice. But as the law now stands, it cannot be said that the existence of the power acts as a deterrent to an owner who can prove that he did not know and could not reasonably be expected to know that any offence was being committed. In former times, it was probably very unlikely that the owner of a ship or animal used in a customs offence was completely ignorant of what went on. But nowadays the number of possible offences under the customs and excise laws has greatly increased, as has the number of opportunities of making use of someone else's property in the commission of such offences; one could not, for instance, hire another man's motor-car in the eighteenth century. Times have changed, but the power of forfeiture has not, except that it has been tightened up and made applicable to a wider range of cases.

It may be urged that the retention of the power in its present absolute terms is justifiable, because the Commissioners can be trusted to act with leniency in an appropriate case. But we ought not to have to trust them; harsh laws are not less harsh because they *may* be leniently applied. It is true that many of our criminal statutes provide very heavy maximum sentences for crimes which may be comparatively trivial—the maximum penalty for burglary, for instance, is life imprisonment—but any person sentenced upon conviction upon indictment is entitled to appeal against sentence, and an outrageously heavy sentence will be corrected by the Court of Criminal Appeal. There is no right of appeal against the severity of the penalty exacted under section 277, although it ought in fairness to be pointed out that in respect of actions of the Revenue authorities, unlike those of judges in their judicial capacity, there is a right to raise the matter by way of question in the House of Commons.

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[5] Customs and Excise Act, 1952, s. 140.

[6] *Ibid.*, s. 114, which prohibits the extraction of spirits from the wood of any cask.

Moreover, it may be doubted whether the reputation of the Commissioners is such that the lenient operation of harsh laws can be safely left to them. Periodic outbursts of angry correspondence in *The Times* and other newspapers have suggested that the Commissioners are quite frequently undeterred from exacting their full pound of flesh. The *Bradley* case, which prompted these reflections, is a case in point. The forfeiture of eight lorries, with all that that implies in the way of possible bankruptcy, seems a grossly heavy price to pay for the offence disclosed in that case.[7]

The passing of a consolidating statute is usually made the occasion for tidying up the law and adding any extra powers which time has shown to be necessary for the administrator; it is almost never used to cast out powers which have become redundant or excessive for modern conditions. It is not, therefore, surprising that on the passing of the Customs and Excise Act, 1952, the occasion was not used for a thorough consideration of whether these antiquated provisions are really necessary or desirable in this day and age. Is it too much to hope that an amending, rather than a consolidating measure will be introduced in the foreseeable future?

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[7] It is of course appreciated that in any particular case there may be other suspected offences not disclosed, but as it would be improper for the Commissioners to use a penalty for a proved offence to make a defendant pay for such other suspected offences, the latter must be ignored in considering whether the penalty is excessive.

©

D. W. Elliott

1958

Kaleidoscope

By Miss D. O. G. Peto,

Formerly Superintendent of the Metropolitan Women Police

On Monday Inspector Crawley was on late turn. In those days, between the two world wars, her headquarters were at Vine Street Police Station or, more correctly, they were upstairs in the Man-in-the-Moon, an old public house which had been absorbed into the station. Having visited her officers on duty at Richmond, Putney and Hammersmith stations she was now at her desk completing a report, drinking a cup of tea and planning the rest of the evening's work with one of her sergeants, whilst three or four women constables, at the other end of the room, consumed the meal technically termed "refreshment." Tonight there were just enough women to cover both of the Piccadilly beats, so when the Inspector had resumed her greatcoat and helmet she started out alone, intending to relieve the sergeant later on and send her in to help in the station.

Vine Street itself was a narrow cul-de-sac tucked in between the backs of business premises, difficult to find and often difficult to get into on account of police cars, tradesmen's vans, and a barrow or two belonging to street vendors who had fallen foul of the law. For foot-passengers, however, there was Man-in-Moon Passage, leading out between two shops into Regent Street, so narrow that it only just admitted a drunk supported by two constables, and so inconspicuous that not one passer-by in a thousand was aware of its existence.

The street scene

Emerging from this passage and crossing Regent Street, the Inspector turned right as far as Piccadilly Circus and then made her way into a narrow street called Glasshouse Street, just now swept by a tide of cars and foot-passengers. On the edge of the pavement, or back against the buildings, stood girls singly or in couples. For the most part they were quite young, crudely dressed and more crudely made up, with a tendency to a high-water-mark at the neck and to shoes down at the heel. First one saw that they were alone, and then one saw that men were talking with them. With so many people passing through the not over-well lit street it required an expert eye to see the actual moment of encounter. In the course of two minutes Inspector Crawley saw three stationary girls make advances to passing men, and two passing men make advances to stationary girls. She also heard one girl, standing back against a house, say "Hello, darleeng!" to a man who stepped round her whilst looking the other way. Technically, this constituted "annoyance of a passenger" or, alternatively, "insulting behaviour whereby a breach of the peace might be occasioned," but Inspector Crawley was not going to arrest the girl because (a) it was the only man she had so far seen her accost and (b) she would have no witness. Obviously the man wouldn't want to be brought into it, even if he had not already been swallowed up in the crowd. The girl had a round hearty face and a stocky build which did not sort very well with her violent make-up. As she moved away Inspector Crawley recognised her.

"Maureen! I warned you last week to keep away from here and you promised me you would go home."

"So I did go home, miss! I only came up here tonight to see a girl what owes me money."

"Who is she?"

"Calls herself Phyllis Benson. Shared my room last week and never paid a farthing of it! It's her you ought to go after, not a working girl like me."

"Working?"

"I wash up at Palliser's. What I do with my evenings is my own business—*I'm* no prostitute!"

"What do you call a prostitute, then, Maureen?"

"*You* ought to know—a girl what lives by it!"

"Sometimes. But a girl can be a prostitute if she lets men go with her for money or for a good time, whether she works or not. How will you feel about having done this sort of thing when you marry?"

Maureen shrugged. "Same as my husband'll feel about the girls *he's* been with! I don't see more harm in one than the other."

"There's harm for both."

"Then why don't you pinch the men along with the girls?"

"The law doesn't work that way. I don't say it's a just law, but it's what the police have to carry out. Go home, Maureen. I'd be sorry to see you in trouble."

Maureen moved off slowly and defiantly. Nevertheless, as soon as she was out of sight she quickened her pace and went off towards her home in the Caledonian Road.

By now it had got round that the women police were about, and the girls began drifting to the top of the street. Nearly all of them turned into Regent Street ahead of Inspector Crawley and melted out of sight. She moved on the residue and followed them.

The prostitutes in Regent Street were older than the Glasshouse Street girls and better turned out. Several wore expensive furs. One led a little dog. The furs were mostly hired, and some of the dresses were hired too.

Across the street Inspector Crawley could see a man standing on the edge of the pavement with his hands in his pockets. She knew that he was watching to see that Lally Wilkshire plied her trade with sufficient vigour. He lived on her earnings. Once Lally had come to the Station to complain of his knocking her about, but when it came to the point she wouldn't face the witness box. The Inspector wished devoutly that she could get a case against him, but he was much too smart to let himself be caught taking money off Lally or even consorting with her. Now, when he saw Inspector Crawley he went off up the street: so she moved on Lally, the woman with the dog, and a third woman, for obstructing the pavement, then, crossing Regent Street, took a side turning which eventually led to Piccadilly through streets of respectable shops, offices and clubs. In one of these streets some charming-looking women talked French to each other. When they saw Inspector Crawley they stepped back on to the neatly railed doorsteps behind them and went on talking to each other. They lived in flats over the shops. Since they were on their own doorsteps there was nothing to be done about it, so Inspector Crawley didn't do anything. She just walked by very slowly and they wished her goodnight.

When Inspector Crawley was a constable she had wanted passionately to clean up the streets, to make harsher laws, to rescue all prostitutes from a life of sin. Sometimes she had even wanted to have them shut up in registered brothels and medically examined twice a week. But for a long time now she had known that one couldn't force people into morality by Act of Parliament, and that the less the State had to do with the control of prostitution the sooner men would grasp the fact that it was they who must learn to control themselves. Meanwhile the Inspector trained her women in scrupulous fairness in their dealings with all street walkers, whilst waging vigilant warfare for the protection of young people and the frustration of pimps, procurers and all other parasites who exploit the frailties of human kind.

It was now time to meet her sergeant in Coventry Street. On her way she glanced into a funfair. Behind the bioscopes which flanked the entrance, with disillusioned peerers finding that what they were viewing for a penny wasn't nearly so indecent as the picture which they had seen outside for nothing, the Inspector caught sight of a cluster of youths around two girls behind the pintables. She looked at the girls' feet and saw that they were encased in plain lace-up shoes with low heels. That was enough for Inspector Crawley. Within three minutes she had cornered them, extracted their stories, refused to believe them, confounded them by cross-examination, detained them as absconders from an approved school, and set out with them for the police station. Once there, she sorted them out, rang up the school, and handed them over to the safe keeping of the woman constable on station duty.

It was now too late to meet her sergeant, so she stepped into the charge room instead.

The station

A male inspector was entering particulars of an arrest in the charge book, looked up and nodded greeting. Two constables, a man and a woman, stood by his desk, completing the entries in their respective notebooks. The prisoner they had brought in had evidently been bailed and was about to go.

" Here's your bail slip. Nine o'clock tomorrow at Bow Street, remember," said the Inspector. The woman thanked him and went briskly away.

As she left the charge room, Inspector Crawley saw no less a person than Phyllis Benson being led in by one policeman whilst a second brought up the rear. Phyllis subsided in tears on the prisoners' bench, protesting her innocence to the station Inspector, to the two constables, and still more vehemently to Inspector Crawley as soon as she caught sight of her. The station Inspector looked her up and down with a gesture of his head as much as to say " Here's another silly girl in trouble! " Then he asked " What's the charge? "

" Insulting behaviour, sir," said one of the two constables, proceeding to explain that he had seen Phyllis accost two men at the top of Glasshouse Street earlier in the evening and had then cautioned her in the presence of the other constable. Later, he had seen her again, this time in Regent Street, where she had accosted two men. The second of these had appeared annoyed, and the constable had thereupon arrested her for insulting behaviour. He had seen her about for several days in company with prostitutes.

The second constable confirmed this account. Phyllis protested. She had only spoken to one chap whom she knew—the girls had been kind to her—she had come up to London to get work! The lady Inspector knew she had, and had taken her to a girls' club. If she was let off she would go home and would never come back!

Pushing back his chair, the station Inspector walked over to the other side of the room and conferred with his woman colleague. Inspector Crawley had no faith in Phyllis's promises, and said so. The girl had been about for the past fortnight, associating with prostitutes, and the arrest was a good thing, as now it would be possible to send her home. In her opinion Phyllis had come up to London with the deliberate intention of seeing what street life was like. By her own account she had a good home, but her parents had spoilt her.

The station Inspector thought the same. "Yes, it's the best thing for the silly lass, and nobody but her parents need be any the wiser. About this club, Miss Crawley?"

"I introduced her to the West End Youth Club in the hope that the secretary might get her confidence, but she told me the girl wouldn't take any advice. She has been staying in a women's lodging house in Waterloo Bridge Road. A girl who had been lodging there was looking for her tonight, and said that Phyllis owed her share of the room."

"All right! We'll send down to the Southampton police to give the father a chance to come up to court. She can be put late on the list. Perhaps one of your women would see to it."

"I shall be there myself. I've a remand from last week."

So Phyllis was duly charged and removed to a cell to await the morning. By this time it was past eleven and the tempo of proceedings had quickened. Two men, arrested in a drunken fight, had to be stitched up by the Divisional Surgeon. A pickpocket was brought in by a C.I.D. officer. Otherwise the prisoners were all street walkers. Two, defiant but businesslike, had been in Glasshouse Street when Inspector Crawley went through. She knew the others as Regent Street women, a little overdressed and over painted, but quiet and courteous. There was no need to explain the procedure for their benefit; just a brief statement by the officer arresting, a nod of assent, then the charge, the listing of property, the bail slip, the reminder of the time for their appearance at court, good night—and exit.

The rush was slackening now. The reserve W.P.C., who had been taking fingerprints in a corner, cleaned off her hands with an oily rag. The night duty W.P.C. came in to relieve her. The station Inspector had already handed over to the night Inspector. The night matron had come on. Phyllis Benson, in her cell, getting what comfort she could from a rubber mattress, two blankets and a cup of tea, fell asleep rehearsing the story she meant to tell to the court in the morning.

Inspector Crawley and the reserve W.P.C. went out into the cold night air together through Man-in-Moon Passage into Regent Street. Just ahead of them the prostitute last to be charged paused on the edge of the pavement and ran a speculative eye over the passing throng. Her intention was so obvious that a policeman coming off duty turned to watch her. In a sudden fury of righteous indignation she waved her bail slip in his face.

" Can't you leave me alone? Don't you see my bail slip? How the hell am I to pay the fine if I don't earn the money tonight? " And rounding the nearest corner she made a bee-line for another client.

So the kaleidoscope of the streets went on turning.

©
D. O. G. Peto
1958

The Magistrates' Association

J. F. MADDEN, J.P., B.A., *Secretary*

The Home Secretary

The 39th Annual General Meeting of the Magistrates' Association was held on October 16 and 17, 1958, and opened with a luncheon held at the Connaught Rooms, at which the guest of honour was the Rt. Hon. R. A. Butler, C.H., M.P., Secretary of State for the Home Department. Replying to the toast for the guests by Lord Merthyr, the Chairman of the Association, he spoke of the rise in crime throughout the country. He said that the Government could help by encouraging research into the cause of crime and by examining and, if necessary, amending the law, but the prevention of crime called for understanding and action by society as a whole. In this the lay magistrates were in a key position; not only were they responsible for the enforcement of the law and the administration of justice, they were also independent members of the community in a special position which enabled them to influence the standards of behaviour of their fellow citizens.

The Master of the Rolls

The luncheon was followed by the first session of the meeting proper and was held at Lincoln's Inn where Lord Evershed, the Master of the Rolls, and this year's Treasurer of the Inn, gave an interesting address to members with the title " Accepted Rather than Exacted," a quotation from a work by Fulbecke, written in 1601 and entitled *A Parallel Conference of Civil Law, Canon Law and Common Law*. In it he said " the English laws are rather popular than peremptory, rather accepted than exacted." Before developing this theme Lord Evershed paid a warm tribute to the retiring Lord Chief Justice, Lord Goddard, who, he said, symbolised in an extraordinary degree the supremacy of the law in a free country. At the same time, perhaps his most striking characteristic judicially was a robust common sense which pervaded his judgments, and that common sense was not only his example but his message to magistrates. Lord Evershed spoke of the highly significant part that has been played in the development and growth of our law by persons who are not lawyers but laymen in their capacities both as members of juries and as magistrates. He quoted from Simonds L.C. who said " justice and the administration of justice should be formally established upon the basis of popular knowledge and approval." Finally, he spoke of the great tradition of integrity and service handed down through the Inns of Court and said that as long as magistrates carried on that tradition so long would English law be " accepted not exacted " and so long would it continue to serve humanity and civilisation.

Annual Report

The meeting continued next day in Guildhall, where, after a welcome by the Lord Mayor, the Annual Report for 1957–58 was submitted to the members by Lord Merthyr. An address was also given by Sir Geoffrey Hutchinson, Chairman of the National Assistance Board, who spoke of the work of the Board and the common problems which faced it and the magistrates. These concerned in particular domestic cases of maintenance for wives and families and also dishonest attempts to conceal the truth and obtain assistance from the Board when it was not deserved.

Presidential Address

In the afternoon the Lord Chancellor gave his Presidential Address, in which he spoke of the wide field of the Association's work and particularly mentioned a visit to France paid by a party of members in the summer. He was glad to welcome three French officials, two from the Court of Appeal and one from the

Department of Approved Schools, who had been invited by the Association to its meeting and had been given the opportunity of seeing something of our own courts and institutions, both for adults and juveniles.

The Lord Chancellor referred to the reform of the magistracy consequent on the Acts of 1948 and 1949, and said that experience since that time had justified the changes then made. There had been more supervision of the work of justices and rules and regulations had had to be made to govern, for instance, the size and composition of benches, the procedure of courts and the method of electing chairmen and deputy chairmen. But there had been no interference by the executive in the administration of justice, and he himself had always refused, both as Home Secretary and Lord Chancellor, to give guidance on sentences for various kinds of crime. Such decisions must be free from external influence and no Minister had either the power or the desire to interfere where justices had acted honestly within their jurisdiction. He spoke of the confidence of the public in the courts and said much of their success had been due to the Advisory Committees, which advised him on suitable persons to appoint and on other magisterial matters. He expressed his thanks to them for the tireless work which they continued to do behind the scenes. Of Magistrates' Courts Committees he said that they had great powers and responsibilities but he hoped that their consultations with local authorities and with benches would be carried out with a feeling and a real spirit of respect for the opinions of all concerned.

The Lord Chancellor then spoke of the serious and alarming increase in crime, especially amongst boys and young men between the ages of 14 and 21, and particularly in the category of crimes of violence against the person. This had led to a public demand for heavier penalties and for the Government to impose a policy of greater severity on the courts. As he had said, it was not for the Government to tell justices how to exercise their discretion, but there was for that very reason a particularly heavy duty on magistrates to consider the various factors which should be borne in mind when passing sentence. The law must be firmly enforced, and at the same time the penalty must be selected which in all the circumstances of the case was likely to deflect the offender from further crime.

He mentioned the unprecedented level of the prison and borstal populations and said that two new alternatives were now available; the first, attendance centres for the age group 17 to 21 and the second, attachment of wages of maintenance defaulters. At the same time, if courts decided that the only suitable punishment for a particular offender was deprivation of liberty, it was their duty to pass such a sentence. "Do not," he said, "pass a sentence which you believe is wrong because it is softer and postpones the difficult day of making the right decision in that case."

Resolutions

A number of resolutions were submitted to the meeting, including various amendments to the constitution of the Association, which were made necessary by the recent large expansion of branches. Other resolutions dealt with the need for work in sufficient amount and variety for prisoners, the necessity for remand centres, and for providing more residential schools for educationally sub-normal delinquent children, and the need to implement the provisions of the Legal Aid and Advice Act, 1949, to make legal aid available in civil cases before justices. These resolutions were passed, and another, in favour of making legal the placing of bets at licensed betting offices, in accordance with a recommendation of the Royal Commission on Betting and Gambling, was carried by a majority of about two to one.

Finally, a motion to the effect that no offences under the Road Traffic Acts, in which the safety or interests of the public were seriously threatened, were suitable to be dealt with under the procedure prescribed by the Magistrates' Courts Act, 1957, was by leave withdrawn.

Practice and Procedure

Assizes and Quarter Sessions

Notice of previous convictions

In R. *v*. HOLT (Court of Criminal Appeal: Lord Parker C.J., Cassels and Streatfeild JJ.: October 13, 1958) H. had been sentenced by quarter sessions to eight years' preventive detention. The notice of previous convictions served upon him under section 23 of the Criminal Justice Act, 1948, set out one conviction only, namely a sentence of preventive detention. Lord Parker C.J., giving the judgment of the court, said that if ever there was a case for preventive detention this was one. H.'s total of offences was 340 and his total sentences amounted to thirty-eight years. No doubt it had been thought by those who drafted the notice under section 23 that it would suffice if notice of a sentence of preventive detention (which itself could only be imposed as a result of a previous notice) were given. Although a prisoner who admits a sentence of preventive detention need not be asked whether he has committed any other offences, as was held in *R.* v. *Evans* (1956) 40 Cr.App.R. 165, yet the notice itself must set out three convictions as called for by section 23. Having regard to the defective notice in the present case, the sentence of preventive detention would be set aside and a sentence of imprisonment substituted.

In R. *v.* O'DONOVAN (Court of Criminal Appeal: Lord Parker C.J., Cassels and Streatfeild JJ.: October 13, 1958) leave to appeal had been granted on the ground that the transcript of the evidence did not record whether the provisions of section 23 of the Criminal Justice Act, 1948, had been complied with. O. had been sentenced to three years' corrective training by quarter sessions. By section 23 of the 1948 Act the notice of previous convictions (*i.e.*, the convictions qualifying the prisoner for a sentence of corrective training or preventive detention) must be served upon the prisoner and upon the court at least three days before the trial. Lord Parker C.J., giving the judgment of the court, said that under the Act no previous convictions could be taken into consideration unless the notice had been served at least three days before the trial and, as it did not appear from the transcript whether or not the notice had been served on the prisoner and on the proper officer of the court at least three days before the trial, the necessary conditions for the sentence of corrective training did not exist. When putting questions in regard to a section 23 notice the prisoner should be asked, or the officer should be asked, when the notice was served and whether it was served both on the accused and on the proper officer of the court at least three days before the trial.

[HENRY PALMER, *Barrister-at-Law.*]

Summary Justice

Drunkenness

After admitting being drunk for the second time in 24 hours, the thirteenth time this year and almost the fortieth time in all, an Irish labourer was fined £2 and banned from buying or getting intoxicating liquor for three years under section 6 of the Licensing Act, 1902. In order to enforce the prohibition, permission was given for the defendant to be photographed so that copies could be circulated to all the local licensees. In the event of his moving to another part of the country, the same procedure would be followed there. He is liable to a fine of £2 and to be sent for treatment under the Inebriates Act, 1898, if he breaks the prohibition. Anyone knowingly supplying him with drink will be liable to a fine not exceeding £20; McCormack: Derby Magistrates' Court (*Manchester Guardian*, November 5).

Fortune telling

Charged with professing to tell fortunes to deceive Her Majesty's subjects, contrary to section 1 of the Fraudulent Mediums Act, 1951, Elizabeth Pearl Price, a pedlar, pleaded guilty and was fined £10. Price had gone to the home of one Mrs. Bowler, telling her that there was a curse on the house and her husband and that she was willing to remove it: she was given £4 10s. Later she asked for another £10; Price: Ilkeston Magistrates' Court (*Birmingham Mail*, October 30).

Road traffic

For driving a motor-cycle in such a position as not to have proper control of it, contrary to the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 86, a West Indian, who pleaded guilty, was fined £3. He drove the motor-cycle standing on the saddle with his arms outstretched; Raymond: Huddersfield Magistrates' Court (*Birmingham Mail*, October 6).

Case and Comment *

ACCESSORY

Evidence—confession—admissible from accused only as to his own acts

See SURUJPAUL *v*. THE QUEEN, p. 806, *post*.

BY-LAW

Noisy instrument—musical box with amplifier

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* Cases are reported, unless otherwise stated, by David Calcutt and Henry Palmer, *Barristers-at-Law*. Commentaries are by Professor J. C. Smith, M.A., LL.B., *Barrister-at-Law*.

Raymond v. Cook

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: *The Times*, October 23, 1958.[1]

Two informations were preferred against R., each alleging that he had caused annoyance to the inhabitants of the neighbourhood by using a noisy instrument for the purpose of selling ice-cream, contrary to one of the by-laws for the good rule and government of the county of Southampton. The by-law in question provided: " No person shall, for the purpose of hawking, selling, distributing or advertising any article, shout or use any bell, gong or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood or persons assembled in a place of worship, entertainment or other place of public assembly."

It appeared that R. had been the driver of a travelling ice-cream cart, which played tunes for the purpose of advertising its business by means of an attached musical box and electrical amplifier. It also appeared that the two complainants were night shift workers, who complained that they had been woken from their sleep. R. was convicted on each of the informations. He appealed, by way of case stated, to the Divisional Court.

Held, that an instrument could be noisy even though it might be called musical; and that, accordingly, the conviction must be upheld.

Per curiam: The by-law was to be interpreted as referring to " a noisy instrument such as was calculated to cause annoyance." The facts might speak for themselves or it might be necessary for magistrates to hear evidence, albeit of one person. [D. C.]

Commentary. See *John* v. *Heath* [1958] Crim.L.R. 385, in which Lord Goddard C.J. said *obiter* in construing a similar by-law, that it was unnecessary to call any witness to say he was annoyed. Evidence had in fact been given by one inhabitant that he was annoyed.

In a case reported in the *Manchester Guardian* for Saturday, September 20, 1958, the Recorder of Southampton is reported to have held, after hearing an ice-cream van sound its chimes, that no one could reasonably say that it was a noisy instrument (" The notes were soft and in tune and the volume was not great—even allowing for a quiet neighbourhood ") and to have allowed an appeal against conviction under the same by-law. The two cases are not necessarily inconsistent, for whether an instrument is noisy or not is, no doubt, a question of fact (like " What is a road? ", below, p. 817).

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[1] For the appellant: *J. D. May* (instructed by John Emmerson & Co.). For the prosecutor: *D. A. Grant* (instructed by Theodore Goddard & Co., for G. A. Whetaley, Winchester).

CERTIORARI

Committal to quarter sessions for sentence—committal order bad in parts—severable

See R. *v.* COUNTY OF STAFFORD QUARTER SESSIONS, *ex p.* ALLEN AND GILBERT, p. 818, *post.*

CHILDREN

Child of eight—criminal responsibility—evidence to rebut presumption of innocence

X v. X

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: *The Times*, October 24, 1958.[2]

A boy, nearly nine years old, was convicted by a juvenile court of breaking and entering a dwelling-house and of stealing certain property from the house. He appealed to Quarter Sessions. Quarter Sessions were of the opinion that, on the facts of the case, the boy was possessed of sufficient understanding and judgment to know that what he had been doing was wrong; and that, accordingly, the strong presumption of innocence in favour of the boy was rebutted. The boy appealed, by way of case stated, to the Divisional Court:

Held, that although in the case of a child between the ages of eight and fourteen there was a strong presumption that the child was of insufficient mental capacity to commit crime (and that the lower a child came in that age scale, the stronger was the evidence required to rebut that presumption), an appellant to the Divisional Court could only succeed if he could show that there had been no evidence before the trial court to rebut the presumption; and that since there had been some evidence before the trial court in this case—*e.g.*, that the boy was a respectable child, who had been properly brought up—the appeal failed. [D. C.]

Commentary. By section 50 of the Children and Young Persons Act, 1933, "It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence." For children between eight and fourteen the rule is clearly stated in the present case. Children above fourteen are treated as adults so far as liability to conviction is concerned, though there are, of course, special rules relating to punishment.

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[2] For the boy: *Peter Thomas* (instructed by Hall, Clark & Goldhawk, for Gwyndaf-Williams & Roberts, Portmadoc). For the prosecutor: *W. T. Williams* (instructed by Whitfield, Byrne & Dean, for Carter, Vincent & Co., Portmadoc).

Most modern criminal codes fix the minimum age of criminal responsibility much higher than eight years, thirteen, fourteen and fifteen being common minimum ages. It is a matter which deserves reconsideration in England. *Cf.* Glanville Williams, *The Criminal Law,* § 215.

EVIDENCE

Accessory—confession—admissible from accused only as to his own acts

Surujpaul v. The Queen

Privy Council: Lords Tucker, Somervell and Denning: [1958] 1 W.L.R. 1050.[3]

S. and four others were charged with murder. The case for the prosecution was that the murder was committed while the accused were carrying out a plot to steal money. The evidence for the prosecution rested largely on the evidence of an accomplice relating to the existence of the plot. There was also material from which the jury might have drawn the inference that the plan was carried out by all or some of the accused, and that the murder was committed in the course thereof. The jury, however, found S. guilty as an accessory before the fact to murder, but his co-accused (other than one who had been discharged) not guilty, either as accessories or as principals. An appeal to the Court of Criminal Appeal for British Guiana was dismissed. On appeal to the Privy Council:

Held, allowing the appeal and quashing the conviction, that it was essential to the conviction of S. as an accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused to commit the murder and that such person or persons had in fact done so. In finding that murder by any one of the accused had not been proved, but that none the less S. was guilty of having counselled one or more of them to commit murder, and that one or more of them, unspecified, in fact committed it, the jury had, apparently returned an inconsistent and contradictory verdict.

Although a statement which S. had made might have afforded very strong corroboration of the accomplice's evidence with regard to the part which S. played in the plot, and as to his counselling the others to commit robbery or murder, it was difficult to see how it could afford any evidence as to the actual commission of the crime at which, by their verdict, the jury had found he was not proved to have been present and assisting.

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[3] For the appellant: *W. P. Grieve* (instructed by Lawrence Jones & Co.). For the Crown: *J. G. LeQuesne* (instructed by Charles Russell & Co.).

Per Lord Tucker: " A voluntary statement made by an accused person is admissible as a 'confession.' He can confess as to his own acts, knowledge or intentions, but he cannot 'confess' as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an 'admission' of this nature." [D. C.]

Commentary. Although the cases of *R.* v. *Bourne* (1952) 36 Cr. App.R. 125 and *Carter Paterson* v. *Wessel* [1947] K.B. 849 give difficulty, it seems an obvious and fundamental principle that no one can be convicted as a principal in the second degree or accessory to the commission of an offence, unless it is proved that that offence has been committed. Nevertheless it is perfectly logical to hold that the fact that the alleged principal in the first degree (P. 1) has been acquitted at an earlier trial is not a bar to the conviction of a principal in the second degree (P. 2) or an accessory before the fact (A. B.). It may be, for example, that fresh evidence has come to light between the two trials, or that no evidence was offered against P. 1. Similar results may be reached even where P. 1 and P. 2 (or A. B.) are indicted together. In *R.* v. *Hughes* (1860) Bell 242, after the prosecution had offered no evidence against P. 1 he was acquitted and called as a witness for the Crown with the result that Hughes was convicted by the same jury as an accessory before the fact to P. 1's alleged crime. The conviction was affirmed, Erle C.J. saying, " Whether he is tried before or at the same time as the principal he may be found guilty as an accessory, although the principal be acquitted." Obviously there was nothing illogical or inconsistent about the jury's verdict in these circumstances.

Where, however, P. 1 and P. 2 (or A. B.) are tried together and the evidence tending to show that P. 1 committed the crime is admissible equally against him and P. 2 (or A. B.) it would be illogical and inconsistent to acquit P. 1 and convict P. 2 (or A. B.); for by their acquittal of P. 1 the jury have said plainly that they are not satisfied by the evidence that the crime was committed; and if they were not satisfied of that fact, then they ought not to have convicted P. 2 (or A. B.). Where P. 1 and P. 2 (or A. B.) are tried together an acquittal of P. 1 would be consistent with a conviction of P. 2 (or A. B.) only in the unusual event of there being evidence, tending to show that P. 1 committed the crime, which was admissible against P. 2 but not against P. 1. If, in the present case, the appellant had actually seen P. 1 commit the murder, and had so stated in a voluntary confession, then it would seem that there would have been evidence against the appellant that P. 1 committed the murder which would not have been admissible against P. 1. In that case the verdicts would not necessarily have been inconsistent—though the conviction would presumably still have been quashed as the distinction between incitement to murder and being an accessory before the fact was not made sufficiently clear to the jury.

EXTRADITION

"Territory" — Great Britain-Norway-Sweden treaty — crime committed on Norwegian ship

R. v. Governor of Brixton Prison, ex p. Minervini

Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Streatfeild JJ.: [1958] 3 W.L.R. 559.[4]

By article 1 of a treaty between Great Britain and Norway and Sweden dated September 30, 1873, it was provided as follows: "The high contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances stated in the present treaty."

M., a seaman, was accused of having murdered another seaman on board a Norwegian ship. On arrival at a British port M. was committed to Brixton prison to await extradition to Norway. He applied for habeas corpus, contending that since the position of the ship at the time of the crime had not been proved, it had not been proved that the crime had been committed "in the territory" of Norway.

Held, that "territory" included Norwegian ships no matter where they were and therefore it was unnecessary to show where the ship had been at the time of the crime: the Norwegian Government had jurisdiction over M. and that was sufficient to enable the proceedings to be brought in England.

Per Lord Parker C.J.: "This treaty is not treating 'territory' in its strict sense, but in a sense which is equivalent to jurisdiction." [D. C.]

Commentary. There is no power at common law to arrest a person who has committed a crime outside the jurisdiction and to surrender him to the State where he committed the offence. The Extradition Act, 1870, applies only to those foreign States with which an arrangement for the surrender of fugitive criminals has been made, and when an Order in Council has directed that the Act shall apply to the arrangement so made. In this case the arrangement was the treaty of 1873, which was the subject of an Order in Council of the same year, applying to it the provisions of the Act.

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[4] For the applicant: *Leonard Caplan Q.C.* and *Lawrence Verney* (instructed by Crawley & de Reya). For the Norwegian Government: *Sir Frank Soskice Q.C.* and *Quentin Edwards* (instructed by Neil Maclean & Co.). For the Governor of Brixton Prison: *R. E. Seaton* (instructed by the Director of Public Prosecutions).

The main difficulty in the way of the applicant's argument, that "territory" meant, not jurisdiction, but an area of the globe, was that article 2 of the Treaty, listing the crimes for which extradition might be ordered, included assaults and revolt, or conspiracy to revolt "on board a ship on the high seas." The applicant contended that "high seas" here meant Norwegian territorial waters; but this argument was rejected by Lord Parker C.J. who said "It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters." The applicant then argued that, as its position was not proved, the ship might have been within the territorial waters of a third power, and that the Treaty could not have been intended to apply to a ship so situated, as this would be legislating in respect of foreign territory, and a gross breach of international comity. The court held that this would be a case of concurrent, or competing jurisdiction for which it would not be wrong to legislate. The result is that the Treaty applies whether the ship is in the territorial waters of the United Kingdom, Norway, or any other country, or on the high seas outside territorial waters.

The question was also raised whether the requisitioning State has *locus standi* in extradition proceedings, but the court found it unnecessary to decide this point, holding that there was power under R.S.C., Ord. 59, r. 17, to direct that the notice of motion be served on the representative in this country of the requisitioning government, so that the court could have the benefit of their views and that the present was a proper and convenient case to give such a direction.

FRAUD

Prevention of Fraud (Investments) Act, 1939—reckless making of statements

R. v. Mackinnon and others

Central Criminal Court: Salmon J.: September 15–23, 1958: retrial, Judge Aarvold: September 30–October 19, 1958.[5]

In an indictment containing twenty counts all the defendants were charged in the first count that they conspired together and with one H. and with other persons unknown to cheat and defraud the subscribers of B., Ltd., by falsely pretending that the advice contained in a circular published by the said B., Ltd., was bona fide advice genuinely given in the interests of and for the benefit of the said subscribers and by diverse other false and fraudulent devices. Other counts charged conspiracies to induce persons to enter into agreements to acquire securities:

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[5] For the prosecution: *Maxwell Turner* and *Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions). For M.: *H. J. Phillimore Q.C.* and *D. Lloyd* (instructed by Messrs Isadore Goldman & Son). For L.: *P. Rawlinson* (instructed by Mr. B. A. Perkoff). B., Ltd., were not represented. For B.: *N. Fauks* and *D. Hurst* (instructed by Mr. P. R. Kimber). For C.: *R. E. Seaton* (instructed by Messrs Sole, Sawbridge & Co.). For W.: *F. H. Lawton Q.C.* and *W. Howard* (instructed by Messrs Claude Hornby & Cox). For W. Trust, Ltd.: *Sebag Shaw* (instructed by Messrs Claude Hornby & Cox).

> by the dishonest concealment of material facts contrary to section 12 of the Prevention of Fraud (Investments) Act, 1939;
> by statements and forecasts known to be misleading, false or deceptive contrary, etc.; and
> by the reckless making of statements and forecasts which were misleading, false or deceptive contrary, etc.

There were also counts of inducing a person to enter into an agreement for acquiring securities by the above means.

The case for the prosecution was that by lies, concealment of the truth and the reckless making of misleading and untrue statements and forecasts the public were induced to buy shares in Tati Goldfields and Sage Oil, with the sole intent of benefiting the defendants. In the committal proceedings H. had been charged with the conspiracy, but the case against him had been dismissed. By order of the court the indictment was amended by striking his name out of the counts in which he was mentioned as a conspirator, Salmon J. saying:

> "In case this should happen again to a member of the public charged before a magistrate with conspiracy and absolved in the magistrates' court, it is wholly wrong to include his name as a conspirator in the counts against the other defendants. I hope this will not happen again."

During the course of the trial Salmon J. ruled on a submission, after reviewing the cases, that "reckless" in section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, has the same meaning as that attributed to it in *Derry* v. *Peek* (1899) 14 App.Cas. 337 and that he would direct the jury to that effect. He was unable to hold that the section, which makes general provisions for the prevention of fraud, had by a side-wind created an offence entirely independent of fraud. But that on the facts the present case was one of dishonesty or nothing. Unless the jury found the defendants guilty of dishonest concealment they could not, on the facts, find them guilty of the reckless making of statements.

On submissions of no evidence, made in the presence of the jury, his Lordship ruled that there was no evidence for the jury against W., B. and the W. Trust, Ltd., and a verdict of not guilty was accordingly recorded in their case. Counsel for the remaining defendants then applied for a retrial on the ground that observations had been made in the course of the submissions critical of the remaining defendants, who might thereby be prejudiced in their trial. On the prosecution's agreeing that the jury might be prejudiced, the jury were discharged from giving a verdict and it was directed that the trial should proceed before a new jury.

At the retrial the prosecution said that they would not invite the jury to convict on the first count or on the counts charging the making of statements known to be misleading.

On the submission, Judge Aarvold ruled that, as far as " reckless " was concerned, he took the view of Donovan J. in *R.* v. *Bates* (1952) 36 Cr.App.R. 175 that " reckless " means a high degree of carelessness, which may include dishonesty, but which may well stop short of dishonesty, and that he would direct the jury to that effect.

M., L., and B., Ltd., were found guilty of the dishonest concealment and reckless counts and C. was found guilty of dishonest concealment only. M. was sentenced to a total of two years' imprisonment, L. to a total of three years' imprisonment, and C. to nine months' imprisonment. B., Ltd., was fined a total of £3,000. [C. B. Orr, *Barrister-at-Law.*]

Commentary. Salmon J. dissented from the construction put upon the word " reckless " by Donovan J. in *R.* v. *Bates* (1952) 36 Cr.App.R. 175, where he directed the jury that it meant " ' careless,' ' heedless,' ' inattentive to duty.' " According to Donovan J.'s direction, mere negligence, which would not ground a civil action in deceit, would suffice for this criminal offence and an honest but careless man could be convicted. According to Salmon J.'s ruling, negligence is not enough and it is necessary for the prosecution to establish that the accused did not honestly believe in the truth of what he said: this gives to the term " reckless " the meaning which it ordinarily has in both civil and criminal law.

Donovan J.'s direction was approved by the Court of Criminal Appeal but, as the jury had not been asked to return a verdict on the count containing the word " reckless," this was admittedly *obiter*. *R.* v. *Bates* has been severely criticised by Dr. Williams (*The Criminal Law,* 121) and it is submitted with respect that Salmon J.'s ruling is greatly to be preferred.

The two cases are of equal authority and it appears that on a retrial, which became necessary in the present case, Judge Aarvold preferred and adopted the view of Donovan J. It is obviously highly unsatisfactory that the law should be left in this unsettled state; but it appears that it will be so left until an appeal squarely raises the issue in the Court of Criminal Appeal.

It is interesting to note that Salmon J. was assisted in arriving at his conclusion by use of the term " fraud " in the title of the Act and the cross-heading of the section and by the fact that fraud was the very essence of the other offences created by the section.

FRAUDULENT CONVERSION

Receiving money knowing it to have been obtained by fraudulent conversion

See R. *v*. BIANCHI, p. 813, *post*.

GAMING

Licensed premises—club registered under the Small Lotteries and Gaming Act, 1956

Smith v. Wyles

Queen's Bench Divisional Court: Lord Goddard C.J., Donovan and Ashworth JJ.: [1958] 3 W.L.R. 528.[6]

The licensee of a public-house was also the president of a bowling club which had its headquarters at the public-house. The club, which was registered under the Small Lotteries and Gaming Act, 1956, promoted a lottery in aid of its funds. Sales of tickets for the lottery were made in the bar of the public-house, and two draws took place in the smoke-room. The licensee knew and approved of the sales and the draws, which were made by releasing two numbered balls from a canister. The holder of the ticket which had the two numbers corresponding with the numbered balls won a prize. The licensee was convicted under section 141 of the Licensing Act, 1953, for suffering gaming to take place on licensed premises, and the two officers of the club who had sold the tickets for the draws were convicted of aiding and abetting the commission of the offences ([1958] Crim.L.R. 389, *sub nom. Police* v. *Smith and Others*). On appeal to the Divisional Court, by way of case stated,

Held, (1) that the drawing of the lottery was gaming, and that continuous participation by the players was not an essential ingredient of gaming; (2) that even though the lottery was one which was lawful under the Small Lotteries and Gaming Act, 1956, the prohibition against gaming on licensed premises contained in section 141 of the Licensing Act, 1953, was paramount and was not affected by the 1956 Act, and that the convictions were accordingly right and should be upheld.

Per Lord Goddard C.J.: "Had Parliament intended to make so startling a departure from its previous policy as to allow lotteries of any description in public-houses while still prohibiting other gaming, I should have expected some very clear words to effect such a change.

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[6] For the appellants: *Sir Frank Soskice Q.C.* and *Stephen Brown* (instructed by Field, Roscoe & Co. for Colin Langley & Smith, Birmingham). For the prosecutor: *B. S. Wingate-Saul* (instructed by Sharpe, Pritchard & Co. for M. P. Pugh, Birmingham).

"I continue to hope that the time will come when by leave and perhaps subject to terms as to costs it will be possible to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court, although it relates to a criminal cause or matter. The complexity of modern legislation, I feel sure, makes this desirable." [D. C.]

Commentary. Gaming has usually been described by the judges as the playing of any game for money: see, *e.g.*, *Dyson* v. *Mason* (1889) 22 Q.B.D. 351. One of the difficulties about the present case is that to describe the procedure at the "Deer's Leap" as "a game" seemed somewhat to strain that notion. Ashworth J. (with whom Donovan J. agreed) got over this difficulty simply by holding that, while undoubtedly some games involved gaming, it did not follow that gaming involved a game. It was suggested in the commentary on the decision of the stipendiary magistrate that if the procedure followed in this case was a game, it is difficult to think of any lotteries which are not games. If, as is now suggested, it is irrelevant whether a game is being played or not, there is the same difficulty that all lotteries would appear to be gaming. Lord Goddard C.J. appears to have accepted this implication and said that participating in a lottery was gaming; but Ashworth J. said that some lotteries involved gaming and some did not; but he did not give any guidance as to how to distinguish between the two classes.

If an ordinary raffle or draw is held by a society registered under the Small Lotteries and Gaming Act, 1956, at an entertainment, it would seem advisable that it should comply with section 4 of the Act, for the entertainment may well be held to be a gaming party.

For previous proceedings, see *Police* v. *Smith and Others* [1958] Crim.L.R. 389.

RECEIVING

Receiving money knowing it to have been obtained by fraudulent conversion

R. v. Bianchi

Huddersfield Quarter Sessions: R. Withers Payne, Esq., Recorder: October 15, 1958.[7]

The indictment against B. contained, *inter alia*, 3 counts, each of which alleged that he received a sum of money from a Mrs. Scott "well knowing the same to have been obtained by the fraudulent conversion of money which had been entrusted to her." The question having been raised whether the offence charged was one known to the law:

Held, that those three counts should be quashed as not disclosing any offence. A man was only guilty of an offence under section 33 (1) of the Larceny Act, 1916, if he received property "knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour." The essence of the crime of fraudulent conversion was that the property so converted has been obtained perfectly lawfully. It therefore could not be an obtaining under circumstances amounting to felony or misdemeanour. On the facts of this case, aiding and abetting fraudulent conversion or conspiracy might well have been more proper charges.

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[7] For the prosecution: *T. R. Nevin* (instructed by Town Clerk, Huddersfield). The prisoner was at this stage unrepresented but was later represented by J. W. Mellor at the court's request.

[John M. Collins, *Barrister-at-Law*.]

Commentary. In *R.* v. *Misell* (1926) 19 Cr.App.R. 109, where A, a servant, bought, on behalf of his employer, certain raincoats, which he then sold to B and C, allegedly very much below fair prices, A was convicted of fraudulent conversion of the coats, and B and C of receiving property obtained in circumstances amounting to a misdemeanour. All these convictions were quashed, and the court said that "by 'obtained' an actual and physical obtaining is meant, and what is referred to is such obtaining as occurs in the case of an obtaining by false pretences, and a larger and comprehensive form of words is used, so as to include property obtained by any other kind of fraud." An innocent receipt followed by a fraudulent misappropriation, therefore, is not enough, unless the misappropriation amounts to stealing.

A bailee obtains goods lawfully but if he then fraudulently converts them, he is guilty of larceny, so there is no difficulty about convicting one who receives the goods from him. The same is true where a servant converts goods received from his master, for he too is guilty of larceny; and where a servant embezzles goods innocently received for his master, for it has been held that embezzlement is stealing for this purpose: *R.* v. *Frampton* (1858) Dears. and Bell 585. In *R.* v. *New* [1957] Crim.L.R. 685 a conviction for receiving goods obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors' Act, 1869, was upheld. The case of fraudulent conversion seems to be an unfortunate gap in the statutory scheme.

ROAD TRAFFIC

Dangerous driving and careless driving—notice of intended prosecution—oral warning

Cuthbert v. Hollis

Sheriff Court of Stirling, Dumbarton and Clackmannan at Alloa: Sheriff-Substitute C. D. L. Murray: 1958 S.L.T. (Sheriff Court Reports) 51.[8]

Section 21 of the Road Traffic Act, 1930, provides: "Where a person is prosecuted for an offence under any of the provisions . . .

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[8] For the accused: Gershon Barras, Stirling (Solicitor).

of this Act relating . . . to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him . . . would be taken into consideration; . . . or (*c*) within fourteen days a notice of the intended prosecution specifying the nature of the alleged offence . . . was served on or sent by registered post to him . . ."

At about 8.25 a.m. on February 18, 1958, H. was involved in a road accident, as the result of which he sustained personal injuries. H.'s doctor, who was present at the scene of the accident, prevented a police constable from giving an oral warning at the time of the accident, on the ground that H. was not in a fit condition to be warned. H. was, however, orally warned by the police at his home at about 4 p.m. on the same day. No summons or notice was served on H. within fourteen days.

Held, that H. had not been warned in accordance with the requirements of section 21 of the Road Traffic Act, 1930, and that H. should accordingly be acquitted.

Per the Sheriff-Substitute: "In my opinion the warning given to the accused in his home at 4 p.m. on the day of the accident was not given 'at the time the offence was committed.' No doubt some elasticity must be given to the words quoted, especially since literal compliance with these terms is completely impossible: in many cases the offence under section 12 (1) of the Act is committed before the moment of collision or impact. Although I do not need to attempt to define what is meant by the words of the subsection, I think that the provision in question seems to envisage the accused receiving warning while still at or about the *locus* of the accident, and at a time, accordingly, when he may be able to enlist the assistance of bystanders who may have witnessed the accident, as possible witnesses in the event of his prosecution. That is the only distinction which I can see between the accused's receiving warning 'at the time when the offence was committed' and receiving warning by letter within fourteen days." [D. C.]

Commentary. The oral warning did not constitute a "notice of the intended prosecution" within the Act, presumably because it was not in writing. The words "served on or sent by registered post to . . ." seem to imply the requirement of a written notice; and it was held in *Hughes* v. *Nimmo*, 1910 S.C.(J.) 45 that, under the Motor Car Act, 1903, s. 9 (2) (repealed), which used the words "sent to," notice must be in writing.

The construction put upon the section by the Sheriff-Substitute seems, with respect, a very reasonable one. Plainly a line must be drawn somewhere, and he appears to have drawn it in the most logical place.

On what is a sufficient serving or sending of notice, see *Beer* v. *Davies* [1958] Crim.L.R. 398.

Dangerous driving and careless driving—notice of intended prosecution—promise of no further proceedings—not invalidated

Lund v. Thompson

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: *The Times*, October 22, 1958.[9]

On February 11, 1958, L. was involved in a traffic accident. On February 14 a notice of intended prosecution was served upon him in accordance with the provisions of section 21 of the Road Traffic Act, 1930, as to which see pp. 812, 813, *ante*. On February 27 the police wrote to L. saying that they had decided to take no further action in the matter. On March 13 the police again wrote saying that they had decided to institute proceedings against him after all.

Held, that the letter of February 27 did not invalidate the notice of intended prosecution.

Per Diplock J.: Section 21 of the Act required that a notice of intended prosecution should be given, it mattered not by whom, and once that was done the condition precedent, and the only condition precedent, to prosecution had been fulfilled. [D. C.]

Commentary. Diplock J. pointed out that this offence (like most other criminal offences) could be prosecuted, not only by the police, but also by any member of the public. The notice required by section 21 could be served by any member of the public and, when once it had been served, any member of the public could take advantage of it. If the defendant's argument were correct, it would be possible for the police to exercise a dispensing power in respect of these offences by sending a notice by one post and then withdrawing it by the next post. It is interesting to find importance being attached to the right of private persons to prosecute, for little is heard of it these days. Diplock J. thought this right one of the ultimate sanctions of the rule of law in this country. Streatfeild J. based his opinion simply on the construction of the section.

The court made it clear that they did not approve of the practice followed in this case, which (though, in this case, it did not do so) might well work injustice; for example, by inducing a motorist to allow his witnesses to disperse beyond recall.

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[9] For the appellant: *Cecil Binney* (instructed by Amery-Parkes & Co.). For the respondent: *E. A. Machin* (instructed by the Solicitor, Metropolitan Police).

Dangerous driving and careless driving—turning with insufficient notice

Pratt v. Bloom

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: *The Times*, October 21, 1958.[10]

B., the driver of a taxi-cab, was charged with dangerous and careless driving, contrary to sections 11 and 12 of the Road Traffic Act, 1930. It appeared that B. had been carrying a fare along Great North Way. The fare told B. to turn to the left. B., however, put on his right blinking indicator. T., who was then driving a car in the same direction as, but to the rear of, B., seeing B.'s indicator, began to overtake B. on B.'s nearside. The fare, seeing the right traffic indicator on said to B.: "No, not right, left." B., without taking any precaution to see whether anything was coming up behind him, put on his left indicator and immediately turned to the left, into the path of T.'s car.

Held, that it was impossible to say that B. was not, at the least, guilty of careless driving. [D. C.]

Commentary. Section 12 (1) establishes "an objective standard, impersonal and universal, fixed in relation to other users of the highway. It is in no way related to the degree of proficiency or degree of experience to be attained by the individual driver": *McCrone* v. *Riding* [1938] 1 All E.R. 157. The offence may thus be committed by making an error of judgment that a reasonably prudent driver would not make: *Simpson* v. *Peat* [1952] 1 All E.R. 447.

Driving without a licence and driving uninsured—whether a car park is a road

Griffin v. Squires

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: *The Times*, October 24, 1958.[11]

Section 121 of the Road Traffic Act, 1930, provides: "'Road' means any highway and any other road to which the public has access, and includes bridges over which a road passes."

S. drove a motor-vehicle in a car park for a distance of about ten yards, during the course of which the vehicle passed through a privet hedge and came to rest on the lawn outside the municipal building at Coalville, Leicestershire. The car park was owned and maintained by the Coalville Urban District Council and the public were allowed to use it at all times without payment. S. was unlicensed and uninsured. She was charged with offences under sections 4 (1) and 35 of the Road Traffic Act, 1930. The justices, being of the opinion that the alleged offences had not been committed on a road, within the meaning of the Act, dismissed the informations. On appeal by the prosecutor to the Divisional Court,

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[10] For the prosecutor: *Paul Wrightson* (instructed by the Solicitor for the Metropolitan Police). For the defendant: *Marven Everett Q.C.* and *M. D. L. Worsley* (instructed by Philip Conway, Thomas & Co.).

[11] For the prosecutor: *E. K. Lane* (instructed by Alfred Neale & Co., for H. V. Jackson & Co., Leicester).

Held, that S. was only guilty of the offences charged if the car park was a road within the meaning of the Road Traffic Act 1930; and whether or not it was a road was a question of fact for the justices to decide. The justices had decided that it was not a road; and since there was evidence to support their conclusion, the court would not interfere with their decision. [D. C.]

Commentary. Whether a place is a road or not is a question of fact but, like all questions of fact it involves a preliminary question of law; *i.e.*, is there any evidence to support the answer contended for. So in *Newcastle-upon-Tyne Corporation* v. *Walton* [1957] Crim. L.R. 479 the Divisional Court reversed the finding of a recorder that a certain quayside was not a road, presumably because there was, in the opinion of the court, no evidence on which he could so find. On the other hand, in *Thomas* v. *Dando* [1951] 2 K.B. 620 the Divisional Court held that a forecourt, which the public were in the habit of using for the purpose only of access to the defendant's shop and that adjoining it, could not possibly be said to be a road. See also *Heath* v. *Pearson* [1957] Crim.L.R. 195 and *Bugge* v. *Taylor* [1941] 1 K.B. 198.

SENTENCE

Committal to quarter sessions for sentence—committal order bad in parts—severable—certiorari

R. v. County of Stafford Quarter Sessions, ex p. Allen and Gilbert

Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Streatfeild JJ.: October 15, 1958.[12]

Informations were laid before magistrates against two youths (a) for stealing and driving away a motor-car without the consent of the owner, contrary to section 28 of the Road Traffic Act, 1930, and (b) for larceny of five gallons of petrol, the property of the car owner. The defendants elected under section 19 of the Magistrates' Courts Act, 1952, to be tried summarily, and pleaded guilty to all the charges, asking that thirteen other offences should be taken into consideration. [The offence under the Road Traffic Act is not included in the First Schedule to the Act of 1952 as an indictable offence in respect of which an accused person can elect to be tried summarily.]

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[12] For the defendants: *Richard Smith* (instructed by Pratt & Sidney Smith). For the magistrates: *John Bourke* (instructed by T. H. Hawkins, Clerk to the Justices, Stafford).

The magistrates committed the defendants to the Quarter Sessions Appeals Committee for sentence, under section 29 of the Act of 1952. By inadvertence the committal order included the offence under the Road Traffic Act as well as that of larceny of the petrol.

The deputy chairman of the Appeals Committee cured the mistake in the committal order by sentencing the defendants to Borstal training for the offence of larceny only, taking into consideration the offence under the Road Traffic Act together with the thirteen other offences.

The defendants were granted leave to appeal to the Court of Criminal Appeal against the sentence, and the appeal was adjourned *sine die* to enable them to apply to the Queen's Bench Divisional Court for an order of certiorari to quash the committal order as wholly bad.

Held, dismissing the application, that though the offence of taking and driving away a motor-car was not within the jurisdiction of the magistrates and accordingly they had no power to convict under section 19 or to commit for sentence under section 29 of the Act of 1952 in respect of that offence, the decision in *R.* v. *Phillips and Quayle* ([1939] 1 K.B. 63 ; (1938) 26 Cr.App.R. 200) was conclusive in the present case. There the court decided that where magistrates committed on several charges the committals were separate and distinct, and if one was bad it did not follow that the others were bad. Here there was one unlawful committal for the offence of taking and driving away a motor-car and that must be quashed. But that did not invalidate the other part of the committal order in respect of the larceny of petrol for that was a lawful committal order. [Miss M. M. Hill, *Barrister-at-Law*.]

Commentary. Under section 19 of the Magistrates' Courts Act, 1952, a magistrates' court may deal summarily with any of the indictable offences specified in the First Schedule to the Act, when the court is satisfied that the offence is suitable for summary trial—*e.g.*, that the sentence which the court has power to inflict is an adequate one. If, after the accused has been convicted, the information as to his character and antecedents, which is then laid before the court, leads the magistrates to the conclusion that the punishment which ought to be imposed is greater than they have power to inflict, they may commit him in custody to quarter sessions for sentence.

The offence under section 28 (1) of the Road Traffic Act, 1930, is punishable *either* on summary conviction *or* on indictment and is therefore both a summary offence and an indictable offence as those terms are defined in section 125 of the Magistrates' Courts Act.

The procedure to be followed in the case of a crime which is both an indictable offence and a summary offence is set out in section 18 of the Magistrates' Courts Act. The court may not begin to hear the case summarily unless an application is made by the prosecutor. If the court were to proceed to try an accused summarily where no application had been made, the proceedings would be without jurisdiction, even though the accused consented. Naturally enough, therefore, the offence under section 28 (1) of the Road Traffic Act is not to be found among the "Indictable Offences by Adults which may be dealt with Summarily with Consent of Accused" listed in Schedule I to the Act.

R. v. *Phillips and Quayle* was concerned with committal for trial (the power to commit for sentence was first introduced by the Criminal Justice Act, 1948), but, no doubt, the principle is the same.

Quarter sessions—committal by magistrates for sentence to Borstal —report as to suitability

R. v. Clark

York Quarter Sessions: The Hon. J. R. Cumming-Bruce, Recorder: September 23, 1958.[13]

On September 15, 1958, the defendant appeared before York City Magistrates in company with three other youths charged with assaulting P. thereby occasioning him actual bodily harm. They pleaded Not Guilty but were convicted and the other three youths were fined. The defendant was remanded in custody for seven days for a report to be made as to his suitability for Borstal training. When he reappeared before them on September 22, the magistrates were given what purported to be a report from the Prison Governor. This briefly outlined the defendant's previous history and concluded: "It is regretted that more information is not to hand to give the court a full report. The time in custody has been insufficient for full inquiries to have been made. Therefore, the Commissioners are unable to report at this stage as to his suitability for Borstal training. If the court so desires, a full report will be made at a later date."

As the quarter sessions were due to be held on the following day, the magistrates did not await a further report but committed the defendant in custody to quarter sessions for sentence in accordance with section 20 of the Criminal Justice Act, 1948. The same report was placed before the Recorder as had been before the magistrates, and the question was raised as to whether this was a sufficient report to satisfy the provisions of section 28 of the Magistrates' Courts Act, 1952. The prosecution conceded that it was not a sufficient report and contended that the case should be remitted to the magistrates to perform their duty under the Magistrates' Courts Act, 1952, s. 28 (2). The defence argued that the purported report was a sufficient report to give the court jurisdiction to consider whether or not this was a suitable case for Borstal training; but that, if this contention were wrong, the committal by the magistrates was null and void as the provisions of section 28 (2) were mandatory, and that there was therefore no valid order in existence retaining the defendant in custody, and consequently he should forthwith be set at liberty. The prosecution pointed out that, applying *R.* v. *Norfolk JJ., ex p. D.P.P.* [1950] 2 K.B. 588, the magistrates were not *functi officio*, and the defendant would still have to be brought before them for sentence. Further, if the order committing the defendant to quarter sessions were void, he should still be regarded as being subject to the remand in custody for a Borstal training report to be made on him.

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[13] For the prosecution: *Alastair Sharp* (instructed by the Town Clerk, York). For the defence: *John M. Collins* (instructed by the court).

Held, that the purported report was not a report as to the defendant's suitability for Borstal training and the magistrates therefore did not comply with the provisions of section 28 (2) which were an essential prerequisite of a committal under section 28. The committal was therefore invalid and the court had no jurisdiction to consider the case. There was no valid order retaining the defendant in custody, and the court could not make any such order with regard to him.

Counsel for the defendant then asked that so far as the court of quarter sessions was concerned, the defendant might be discharged. The Recorder refused to order that the defendant be discharged on the ground that as he had held that the defendant was not within his jurisdiction at all he had no power to make any order whatsoever in respect of him. If the Prison Authorities chose to hold him in their custody on their own authority that was their affair. (The defendant was released by the Prison Authorities later the same day.) [John M. Collins, *Barrister-at-Law*.]

Commentary. Where a magistrates' court convicts a person between sixteen and twenty-one years of age of an offence punishable on summary conviction with imprisonment, and the magistrates are satisfied that it is "expedient for his reformation and the prevention of crime" that he should go to Borstal, they may commit him to Quarter Sessions for sentence. Before doing so, however, the court is required to obtain and consider a report made by or on behalf of the Prison Commissioners "on the offender's physical and mental condition and his suitability for a sentence of Borstal training." The report in the present case was not, on the face of it, a report as to the prisoner's "suitability for Borstal training." The order remanding the prisoner in custody for the report to be made presumably expired on September 22 and, thereafter, he was illegally detained.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by Henry Palmer, *Barrister-at-Law*

Imprisonment

In R. *v.* Aldren the court (Lord Parker C.J., Cassels and Streatfeild JJ.: October 13, 1958) reduced sentences totalling three years' imprisonment for attempted office-breaking and larceny to sentences totalling eighteen months' imprisonment. A., together with a man called Slater (whose sentence was also varied as reported *infra*), and another person, had been convicted at quarter sessions where two other offences were taken into consideration, namely, the larceny of a motor-car and the larceny as bailee of a television set. He was sentenced to twelve months' imprisonment for the attempted office-breaking and to two years' imprisonment for the larceny, the sentences to run consecutively. A., who was a man of twenty-nine years of age, had ten previous convictions dating from 1948, all of which were for offences of dishonesty. His last conviction was in July, 1957, when he was sentenced to nine months' imprisonment for larceny from a motor-car. The present offences were committed when A. and S., together with A.'s wife, abandoned the stolen car after it had run out of petrol. They saw a full bottle of milk outside some offices and A.'s wife drank some of the milk. Then S. went round to the back of the offices where he smashed the door with a brick. The court stated that the sentences seemed to be out of line with the gravity of the offences. The sentence of twelve months' imprisonment for attempted office-breaking should stand but the sentence for the larceny, which was the less serious offence, should be reduced to one of six months' imprisonment, to run consecutively.

Imprisonment

In R. *v.* Dorrian the court (Lord Parker C.J., Streatfeild and Thesiger JJ.: October 13, 1958) reduced a sentence of three years' imprisonment to one of two years' imprisonment. D. had pleaded guilty at assizes to assault occasioning actual bodily harm and to assaulting a police officer in the execution of his duty. He was a man of thirty-one years of age and of previous good character. The facts were that D., with four other men, set upon a taxi-driver who refused to carry them. The taxi-driver was kicked in the face and very serious injuries were inflicted. A police inspector arrived in plain clothes and, later, police in uniform. When the police inspector tried to arrest the ringleader, G., he was attacked by D. and by the others. Later there was a minor offence in respect of assaulting one of the police in uniform. G. had been sentenced to three years' imprisonment for the offences. The court stated that these were quite serious offences but it was G. who was the ringleader; it was G. who had set upon, and invited the others to set upon, the taxi-driver. In fact D. had taken no part in that attack. In all the circumstances D. ought to be sentenced to a shorter sentence than G., and the sentences upon D. would be varied to two years' and twelve months' (to run concurrently), a total of two years' imprisonment.

Imprisonment

In R. *v*. BURTON the court (Lord Parker C.J., Streatfeild and Devlin JJ.: October 20, 1958) reduced a sentence of twelve months' imprisonment to one which would permit immediate discharge. B. had been charged at the Central Criminal Court of offences of larceny and falsification of accounts. B. was a woman of thirty-six years of age and previously of good character. The case was presented at the trial on the basis that B., in her capacity as chief cashier at a United States air force base, had stolen money and had falsified the accounts in order to conceal the deficiency. The jury acquitted B. of the larceny. The court stated that, having regard to the acquittal on the larceny charge, this case had to be approached on the basis that the purpose of the falsifications had been to conceal someone else's fraud, although no doubt B. had been negligent in failing to inform her employers of the fraud and in continuing to conceal it from them. B. was a woman of completely good character and she had been in prison since July 2. In all the circumstances the appropriate sentence was one which would permit B. to be discharged tomorrow.

Preventive detention

In R. *v*. SLATER the court, when dealing with Aldren (reported *supra*), reduced a sentence of seven years' preventive detention for attempted office-breaking to one of two years' imprisonment. S.

had been convicted at quarter sessions, where one other offence, namely, the larceny of a motor-car, had been taken into consideration. S., who was a man of thirty years of age, had seven previous convictions, in 1946 for larceny, in 1947 for larceny in a dwelling-house (sentence: borstal training), in 1948 for burglary (returned to borstal), in 1950 for store-breaking and further offences of larceny (two years' imprisonment), in 1952 for unlawful wounding and breaking and entering (two years' imprisonment), in 1954 for warehouse-breaking and larceny (three years' imprisonment), and in 1956 for workshop-breaking and larceny (eighteen months' imprisonment). The short facts of the present offence are set out in Aldren's case (*supra*). The court stated that S. was clearly headed for preventive detention but that the sentence was out of line with the gravity of the offence and that, having regard to his age, the proper sentence was one of two years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

Preventive detention

In R. *v*. MACDONALD the court (Lord Parker C.J., Cassels and Streatfeild JJ.: October 14, 1958) reduced a sentence of twelve years' preventive detention to one of eight years' preventive detention. M. had been convicted at quarter sessions of three offences of housebreaking and larceny. M., who was a man of thirty-five years of age, had twelve previous convictions, the first prison sentence being in 1945 when he was sentenced to six months' for larceny. He then had a series of convictions, mostly for housebreaking, in respect of which he was given sentences varying from three months' to two years'. In 1951 he was sentenced to six months' imprisonment for larceny; in 1952 to five years' imprisonment for housebreaking and storebreaking; and finally in 1956 to thirty months' imprisonment for housebreaking. He was released from his last sentence in April, 1958, and committed the first of the present offences about seven weeks later. The court stated that, in their view, the sentence of twelve years' preventive detention for a man of thirty-five whose longest sentence of imprisonment had been five years was excessive. The appropriate sentence was one of eight years' preventive detention.

Corrective training—Defective notice of previous convictions

In R. *v*. ROBERTS the court (Lord Parker C.J., Streatfeild and Devlin JJ.: October 20, 1958) varied a sentence of three years' corrective training for office-breaking and larceny to one of two years' imprisonment where one of the two convictions contained in the notice of previous convictions under section 23 of the Criminal Justice Act, 1948, was not for an offence punishable on indictment with imprisonment for two years or more as required by section 21 of the Act. That conviction was for assault on the police which had been charged under section 12 of the Prevention of Crimes Act, 1871 (under which the maximum penalty is six months' imprisonment). The notice under section 23 stated that the conviction was for " assault on police " but did not state under what section the offence had been charged. The court stated that it had been assumed that the conviction had been under the Offences against the Person Act, 1861, but that it now appeared that R. was not eligible for corrective training. In the special circumstances of this case, two years' imprisonment would be substituted for the sentence of three years' corrective training.

Probation

In R. *v.* WOODHOUSE the court (Lord Parker C.J., Streatfeild and Devlin JJ.: October 20, 1958) set aside a sentence of twelve months' imprisonment and substituted therefor a probation order. W. had pleaded guilty at a Crown Court to shopbreaking. W., who was a man of thirty-six years of age, had three previous convictions of quite a different type (1947: bestiality. 1954: attempted suicide. 1955: attempted suicide). The present offence was committed when W. got drunk, kicked in a shop window and stole a few tins of fruit and tomatoes. The court stated that they were prepared to give W. another chance and would put him on probation for three years with a condition that he should not frequent any public-houses or clubs where drink was served.

Acts and Orders *

Animals

Hay and straw may now be imported from Denmark in addition to the countries specified in the principal Order (S.I. 1955, No. 370). Operative October 20, 1958. IMPORTATION OF HAY AND STRAW (AMENDMENT) ORDER, 1958 (S.I. No. 1690).

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Regulations made under section 10 of the Slaughterhouses Act, 1958 (6 & 7 Eliz. 2, c. 70; [1958] Crim.L.R. 698), (1) provide for payment of Exchequer grants to local authorities in respect of meat inspected in excess of the quantity required for local consumption; (2) determine the basis and method of calculation of such grants and lay down the terms and conditions of payment. Operative October 2, 1958. SLAUGHTERHOUSES (MEAT INSPECTION GRANT) REGULATIONS, 1958 (S.I. No. 1606).

Coroners

The allowances to be paid to witnesses who attend to give evidence, other than professional or expert evidence, at inquests are increased. The former allowances of 30s. a day or 15s. for not more than four hours, are increased to 40s. and 20s. respectively. The principal Rules (S.I. 1955, No. 1668) are modified accordingly. Operative November 1, 1958. CORONERS (FEES AND ALLOWANCES) (No. 2) RULES, 1958 (S.I. No. 1716).

Hire-Purchase

All controls on hiring agreements and on hire-purchase and credit-sale agreements were revoked on October 29, 1958. HIRE-PURCHASE AND CREDIT-SALE AGREEMENTS (CONTROL) (REVOCATION) ORDER, 1958; CONTROL OF HIRING (REVOCATION) ORDER, 1958 (S.I. Nos. 1771 and 1772).

Juries

The principal Regulations are amended by increasing the maximum financial loss allowance payable to jurors in respect of one

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* Prepared by F. M. Drake, *Barrister-at-Law*.

day's service from 15s. to 20s. for a period of not more than four hours and from 30s. to 40s. for a period of more than four hours. The Regulations amended are S.I. 1954, Nos. 1627 and 1650. JURORS' ALLOWANCES REGULATIONS, 1958 (S.I. No. 1737); (SCOTLAND) AMENDMENT REGULATIONS, 1958 (S.I. No. 1754).

Juvenile Courts

The juvenile court which sits on Thursday of each week at the Chelsea Juvenile Court, Walton Street, London, S.W.3 will cease to sit after November 13, 1958, and as from that date a new juvenile court for the same area will sit at 181 Marylebone Road, W.1 on Thursday of each week at 10 a.m. The Orders of 1955 (S.I. No. 873) and 1958 (S.I. No. 417) are modified accordingly. Operative November 17, 1958. JUVENILE COURTS (LONDON) (No. 2) ORDER, 1958 (S.I. No. 1750).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1741 (Carshalton); 1742 (Epping); 1743 (Paddington).

Probation

The salary scales of all principal probation officers, including deputy principal probation officers, in Scotland, are further increased. The principal Rules (S.I. 1951, No. 1261) are amended accordingly. Operative forthwith, save that the salaries increases are backdated. PROBATION (SCOTLAND) AMENDMENT (No. 2) RULES, 1958 (S.I. No. 1694).

Witnesses

The allowances payable to persons attending to give evidence in criminal cases to which the Costs in Criminal Cases Act, 1952, applies are increased in the case of a witness attending for more than four hours from 30s. to 40s. and for not more than four hours from 15s. to 20s. The 1955 Regulations (S.I. No. 1655) are amended accordingly. WITNESSES' ALLOWANCES REGULATIONS, 1958 (S.I. No. 1717).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

51. *Motor-vehicle—motor-cycle without a petrol tank*

I arrested a man who I found sitting astride a motor-cycle in the street and propelling it along with his feet. He was obviously very drunk and inquiries revealed that he had taken the machine from a bombed site without the consent of the owner.

I subsequently discovered that the petrol tank of the motor-cycle was missing, having been removed by its owner for repairs.

In view of the condition of this machine do you consider that it was still a motor-vehicle for the purpose of substantiating a charge of "taking and driving away" contrary to section 28 of the Road Traffic Act, 1930?

If your answer is in the affirmative do you consider that the man in question could be said to be *driving* the vehicle in order to prefer a further charge of "driving whilst under the influence of drink" contrary to section 15 of the same Act, and, further, for *driving* it without a licence contrary to section 4? If your answer is in the affirmative to the first question I am reasonably satisfied that he was *using* it without insurance contrary to section 35 of the said Act. Do you agree? [L. P.]

ANSWER

In my opinion, on the facts of this case, the motor-cycle without its petrol tank was not a "motor-vehicle" within the relevant provisions of the Road Traffic Acts; but I would stress that there are somewhat conflicting decisions on this point and I do not think a firm opinion on the position can be given before there is a further ruling of a competent court—preferably the Divisional Court.

It is quite certain that *any* movement of a car without the consent of the owner (even merely pushing it a short distance) is enough to bring the person who moves it within the ambit of section 28 (1) of the Road Traffic Act, 1930 (see *Shimmell* v. *Fisher* [1951] 2 All E.R. 672; 115 J.P. 526).

Therefore the actions of the man sitting astride the motor-cycle and pedalling it along with his feet would be sufficient to constitute the offence *provided that* the vehicle could, in the circumstances, be called a " motor-vehicle."

In *Lawrence* v. *Howlett* [1952] 2 All E.R. 74; 116 J.P. 391 the Divisional Court held that a pedal-cycle fitted with an auxiliary motor which was not at the relevant time in working order was *not* a motor-vehicle for the purposes of failing properly to insure it within the provision of section 35 (1) of the Road Traffic Act, 1930, or within the meaning of section 1 of that Act. But this decision was influenced by the fact that a motor-assisted pedal-cycle is, in effect, a dual-purpose vehicle which can be used either as an ordinary pedal-cycle *or* as a form of motor-cycle; and all three members of the court expressed hesitation in reaching the decision, it being stressed that it was only based on the exceptional facts of that case. Devlin J., pointing out that the decision depended on the dual-purpose nature of a motor-assisted bicycle, said that where a machine is constructed solely for mechanical propulsion it does not cease to be a motor-vehicle merely because the machine is out of working order.

In *Floyd* v. *Bush* [1953] 1 All E.R. 265; 117 J.P. 88 it was held that the accused had been rightly convicted under the provisions of section 35 (1) for using a motor-vehicle without proper insurance despite the fact that the accused was, at the time of the offence, *pedalling* a motor-assisted pedal-cycle and had not switched on the engine. The distinction on the facts between this case and *Lawrence* v. *Howlett*, *supra*, was that in *Floyd* v. *Bush* there was an efficient motor in working order although it was not being used; whilst in *Lawrence* v. *Howlett* the motor was completely out of commission.

But both these cases refer to the special case of motor-assisted bicycles; and from the dictum of Devlin J. in *Lawrence* v. *Howlett* it might appear that a motor-cycle without a petrol tank is, none the less, a motor-cycle.

However, I am of the opinion that the answer must finally rest on the facts of each case. A motor-cycle with all parts complete but which was not working would clearly remain a " motor-cycle." If merely the brakes or lights or similar accessories were missing, the same would be true; but there must, I think, be a position where no longer can the object be called a motor-vehicle; and where the tank is missing I think that position has been reached. In my opinion a motor-vehicle without its motor or some substantial part thereof ceases to be a " motor " vehicle.

It is interesting to refer to the civil decision of *Karsales* (*Harrow*) *Ltd*. v. *Wallis* [1956] 2 All E.R. 866, in which, for the purposes of an agreement between two parties, Birkett L.J. remarked that a car which had become so dilapidated that it would not go was not "in the true meaning of words" a car at all.

I do not think a motor-vehicle without a motor or petrol tank remains a motor-vehicle; but the question is, quite clearly, a very open as well as a very interesting one. [M. D.]

Books and Periodicals

Book Reviews:

Russell on Crime. Eleventh edition by J. W. C. Turner. London: Stevens & Sons, Ltd. 1958. Two volumes. (1) cli and 908 and (index) 56 pp.; (2) x and 909–1843 and (index) 56 pp. (£10 10s. net.)

The second edition of *Russell* to be edited by Mr. Turner has been shorn of its sub-title, *A Treatise on Felonies and Misdemeanors*, and, incidentally, the more usual spelling, "misdemeanour," is now adopted throughout the book. Mr. Turner tells us in his preface that he was unable, in the tenth edition, fully to accomplish the scheme of reorganisation which he felt to be desirable; and it is at once apparent that the arrangement of the material in the present edition has been greatly improved. The chapters on "Preliminary Crimes" and "Parties to the Commission of Crime" have been moved from the end of the book to "Part One: Preliminary Matters," where they more logically belong. "Offences against the Law of Nations," which, strangely, were formerly the first crimes to be considered, now become Part Twelve, and offences relating to the revenue and offences against religion are also relegated from near the beginning of the book to the end.

It should also be said at once that the book has been most thoroughly and carefully brought up to date and that little seems to have been overlooked. Not only the cases in the major series of law reports, but also those briefly reported in this *Review* and elsewhere have been noted, and, in many cases, critically discussed. Mr. Turner has expanded his discussion of general principles under the heading of "Criminal Responsibility," and some of the new material has caused your reviewer difficulty. We are told (p. 25) that "A clear analysis of the requirements of law for the establishment of criminal liability demands a term which indicates the physical element alone, entirely distinct from that mental element which the old maxim[1] so sharply set in opposition to it." It would, perhaps, be generally agreed that "If this distinction is preserved much confusion of thought may be avoided." Unhappily, Mr. Turner himself adopts a narrow view of *mens rea* which fails to preserve it. For, only on the previous page (p. 24), we are told that the *intent to commit a felony therein* is part of the *actus reus* of burglary; that the italicised words "indicate a personal characteristic of the man charged with being a burglar."

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[1] *i.e.*, "actus non facit reum nisi mens sit rea."

Now it is clear that personal characteristics are sometimes part of an *actus reus*; "being married" in bigamy, being a British subject in treason, being under seventeen when charged with driving a motor-vehicle under that age, are obvious examples. These instances, however, have nothing to do with the accused's state of mind, whereas the *intent to commit a felony therein* is exclusively a mental element. To classify it as part of the *actus reus* blurs that sharp distinction which Mr. Turner rightly considers necessary for clear analysis. And where are we to stop? For instance, is the *intent permanently to deprive the owner thereof* in larceny a "personal characteristic" of the offender and so part of the *actus reus*? If not, why not?

The treatment of mistake also suffers from the narrow view taken of *mens rea*. According to Mr. Turner the *mens rea* of murder is simply an intention to kill a human being, so that even the public executioner, hanging a lawfully condemned criminal, has *mens rea* (p. 78). If an innocent person were to be substituted without the executioner's knowledge, and hanged, the executioner would undoubtedly have caused the *actus reus* of murder. As, according to Mr. Turner, he did so with *mens rea*, we appear to reach the absurd result that he is guilty of murder. Mr. Turner gets out of this one by the rather (with respect) clumsy device of saying that "his trial should proceed on the legal fiction that the facts were as he supposed them to be, and not on the true facts. That is to say, the tribunal is to come to its decision on the basis of a pretended set of facts which the prosecution is not allowed to deny." Would it not be much simpler and more realistic to say that the accused has no *mens rea*? It is, after all, his innocent *mental* state which requires his acquittal. If this course is adopted then the notion of *mens rea* must be extended so as to include, not only foresight of consequence, but also knowledge of relevant circumstances. But there is no great difficulty about this. No one would say that an *intention to receive goods* is sufficient *mens rea* for receiving stolen goods. It all depends on what the accused knows about the goods. So, too, with killing a man.

"Statutory Offences" are now given a separate short chapter. Mr. Turner thinks it misleading, even in the case of these offences, to refer to "crimes of negligence." Since it is necessary to prove no mental element in the case of the crimes which are sometimes so described, he would include them in the category of offences of strict liability. It is, however, necessary in such cases to prove that the accused's conduct departed from the standard to be expected of a reasonable man; and it is thought that it is useful to have a term to distinguish offences requiring this objective element of blameworthiness from crimes where a man may be found guilty although he took all proper care—which are aptly described as offences of strict liability. "Negligence" seems the obvious term. Mr. Turner precludes himself from using it in this sense because he insists that, in the criminal law, it can properly be used only to describe a state of mind. This results in a failure to distinguish between two types of crime which, it is submitted, ought to be distinguished.

The treatment of "Parties to the Commission of Crime" has been expanded by some 24 pages and is much more comprehensive than formerly. Some passages seem to be contradictory. Thus it is emphasised at the outset (p. 134) that "when the law relating to principals and accessories as such is under consideration, there is *only one crime* although there may be more than one person criminally liable in respect of it"; yet at the end of the chapter (p. 178) we find it argued that "Since the crime of the principal offender and that of the accessory after the fact are *quite distinct*, the fact that the principal may have pleaded guilty or have been convicted, does not preclude the alleged accessory from asserting that no such felony was in fact committed." It is thought that the former proposition is strictly correct [2]; and the proposition that the conviction of the principal is not binding on the accessory does not depend on the fact that their crimes are "distinct," but on rules of evidence.

Again, in the statement of the principles governing accessories before the fact, it is said (p. 161) that "the bare minimum" which must be proved is "(a) that he knew that the particular deed was contemplated, and (b) *that he approved of it*, and (c) that his approval of it in fact encouraged the principal offender to perform the deed." Yet on page 164 it is suggested that "'assent' to the commission of the felony is enough"—and assent is something less than approval. The recent case of *National Coal Board* v. *Gamble* [1958] 3 W.L.R. 434 shows that, if aid is given, mere assent without approval is enough for liability as principal in the second degree. Should not the rule be the same for an accessory?—but *R.* v. *Fretwell* (1862) L. & C. 161 is certainly an obstacle in the way of so holding.

Mr. Turner has slightly modified (p. 195) his well-known theory on the *actus reus* of an attempt. His test no longer requires that "the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime." It is enough that ". . . the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime he is charged with attempting." This modification goes some way towards meeting the criticism made by Dr. Williams, *The Criminal Law*, § 145; but it does not seem to go the whole way and would not meet the difficulties encountered in the application of a similar test in New Zealand: see *Campbell and Bradley* v. *Ward* [1955] N.Z.L.R. 471 and (1955) 18 M.L.R. 620.

The treatment of murder has been complicated rather than simplified by the Homicide Act, 1957; for, owing to the uncertainties which still surround the interpretation of that Act, Mr. Turner has thought it necessary to retain most of the old material. His views on the effect of section 1 of the Homicide Act, 1957, have already appeared in this *Review* (see [1958] Crim.L.R. 15) and have been vigorously criticised by an anonymous writer ([1958] Crim.L.R. 714). In the chapter on manslaughter the doctrine that a subjective *mens rea* is always required and that negligence will not suffice is maintained; but no reference is made to *R.* v. *Burdee* (1916) 12 Cr.App.R. 153, which is, perhaps, the strongest of the authorities on which Dr. Williams relies (*op. cit.*, p. 90) for a contrary doctrine.

There is not much to say about the majority of the Larceny Act crimes where the text is brought up to date but is basically unchanged. It should, however, be pointed out that *R.* v. *Riley* (1853) 6 Cox 89 has now received the approval of the Court of Criminal Appeal in *R.* v. *Kindon* (1957) 41 Cr.App.R. 208, which is not cited; and that *McGregor* v. *Benyon* [1957] Crim.L.R. 250 has been reversed ([1957] Crim.L.R. 608).

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[2] Since this review was written this passage has received the approval of the Privy Council: *Suruipaul* v. *The Queen* [1958] 1 W.L.R. 1050, 1053, p. 806, *ante*.

The suggestion (in the Preface) that *Moynes* v. *Coopper* has finally " disposed of " the decision in *R.* v. *Ashwell* is hardly consistent with the retention of a 23-page Appendix criticising the latter case; and it is thought that the suggestion is premature. The chapter on embezzlement has been almost doubled in length as a result of the critical treatment of *R.* v. *Tomlin* [1954] 2 Q.B. 274 and, especially, *R.* v. *Davenport* (1954) 38 Cr.App.R. 37. Mr. Turner's views on the latter case have already appeared at greater length in this *Review* ([1956] Crim.L.R. 589, 659, 730) and have been criticised by your reviewer ([1957] Crim.L.R. 640, 722).

The view is maintained that fraudulent conversion can only be committed by an owner in the face of dicta to the contrary in *R.* v. *Williams* [1953] 1 Q.B. 660 and *R.* v. *Davenport.* In the leading case of *R.* v. *Grubb* [1915] 2 K.B. 683 there can be little doubt that the converted property was owned by the company and not by the accused. A new explanation is offered (p. 1267): " . . . even if it could be accepted that it was the company which was guilty of the offence, yet it was through the accused man alone that the company acted, so that he would be equally guilty as a joint principal in the crime." If only an owner can commit fraudulent conversion it would seem to follow that a non-owner could only be guilty as an aider and abettor (*cf. R.* v. *Ram* (1893) 17 Cox 609); and we would have the rather curious situation that Grubb's acts, when attributed to the company, would constitute it a principal in the first degree; and, when considered as his own acts, would make him a principal in the second degree. No doubt the case *could* have been decided in this way; but the actual decision seems to have been that Grubb (not the company) was " entrusted " when he " obtained or assumed control " of the property; and, on the facts, he could hardly have been the owner.

In the interval between the tenth and eleventh editions of *Russell* the first part of a new major treatise on the criminal law, that of Dr. Williams, has been published and, though we still await (with impatience) the appearance of Dr. Williams's volume on specific crimes, it is tempting to compare the two works. Inevitably, a brand new treatise by a single author has a consistency of style and approach which is lacking in a book which was first published in 1819, and has since passed through the hands of several editors. *Williams*, in the style of modern textbooks, concentrates throughout on the elucidation of legal principles and is free from the long accounts of cases which encumber some parts of the text of *Russell.* The searcher after legal principle or argument is likely to find the newer book the more rewarding whereas the historical development of the law is more fully treated in the older. The reader who wishes to refresh his memory of the cases, moreover, may well find most of them accurately summarised, with apt quotations from the judgments, in *Russell.* Mr. Turner has invested so much legal scholarship in *Russell* that it must remain an important book for a very long time to come; but, in spite of the great improvement which he has made, comparison with *Williams* may suggest that the practice of editing and re-editing textbooks, long after their authors are dead, might profitably be abandoned or curtailed in favour of encouraging new books.

The book is very handsomely produced and a most useful new feature is the printing of the index to the whole work in each volume. In spite of this the publishers have contrived not to increase the price over that of the 1950 edition—a rare feat on which they are to be congratulated. But was it necessary to use much thicker paper so that the two volumes now occupy more shelf space and are less convenient to handle?

J. C. Smith.

Cases on Criminal Law. Second edition by J. W. C. Turner and A. Ll. Armitage. Cambridge University Press. 1958. xxiii and 683 and (index) 6 pp. (60s. net.)

This book which first appeared in 1953 is based on the eighth edition of Kenny's *Cases on Criminal Law.* The subject-matter is arranged in the same order as Kenny's *Outlines of Criminal Law* and the two books are cross-referenced so that they can very conveniently be used together. The cases cover not only the substantive rules of criminal law, but also the general principles of evidence (of which there is an admirable short account in the *Outlines*). No attempt is made, however, to cover criminal procedure (which is also dealt with in the *Outlines*)—but this is reasonable enough, since the material is mainly statutory.

This second edition is, in fact, a reprint of the first with a supplement of 120 pages, in which a selection of the cases decided since 1953 has been set out under the same headings as the main part of the book. Also included are *H.M. Advocate* v. *Braithwaite*, 1945 J.C. 55 which has become relevant to English law through the adoption of the defence of diminished responsibility by the Homicide Act, and *R.* v. *Matthews* (1873) 12 Cox 489—perhaps to support a new sentence in the *Outlines* (p. 261) to the effect that a finder does not become a bailee. All the recent English cases of any importance seem to have been included (indeed, to have both *Chan Kau* and *Lobell* appears rather extravagant) and there is an interesting judgment of the Court of Criminal Appeal in Northern Ireland on public mischief (*R.* v. *Bailey* [1936] N.I. 15).

One slight disadvantage of the method adopted to bring the book up to date is that it is only when he turns to the supplement that the student will realise that some of the propositions he has read (and possibly learned) in the cases in the body of the book no longer represent the law. But no doubt the alternative was an even greater increase in price, and it is already expensive for a students' book. The reader who does not have easy access to the law reports, however, will get his money's worth; for it is the most comprehensive collection of criminal cases available and is beautifully printed and bound.

J. C. Smith.

Justice Triumphant. By Cecil Fielding. London: John Long. 1958. 162 and (index) 3 pp. (16s. net.)

Books have poured from the press of recent years criticising the decisions in a number of criminal cases. These cases have been presented as miscarriages of justice and convictions of the innocent.

Mr. Cecil Fielding strikes a blow for British justice but one cannot help feeling that he over-does it. The main criticism of this book is that it over-simplifies some of the issues. Few would agree entirely with his contention that the criminal law is clear, he appears to have overlooked the remarks of the former Lord Chief Justice concerning the law of larceny and the criticism from many sides of the law of homicide as affected by the Homicide Act, 1957.

The book is, however, worth reading for those who wish to get in perspective some of the most criticised of recent trials, *e.g.*, those of Christie and Evans.

P. A.

Brief to Counsel. By Henry Cecil. London: Michael Joseph. 1958. 185 and (index) 4 pp. (12s. 6d. net.)

The Lamberts Choose the Law. By Michael Thomas. London: Chatto and Windus. 1958.

Each of these two books is designed to give a description of the life of a lawyer. The first, by Henry Cecil is written for the young man or woman who has decided to become a barrister. It gives an excellent picture of a barrister's life, it is fair and, being written by a county court judge, very much to the point. Mr. Henry Cecil does not present the usual rosy picture of the Bar which the layman is inclined to imagine from reading biographies of famous advocates or of hearing of the unauthenticated vast income attributed to some of the leaders of the past.

There are delightful illustrations by Edward Ardizzone. This book should be read by anyone intending to go to the Bar and will be enjoyed by all interested in the Bar.

The *Lamberts Choose the Law* is a volume in the Chatto and Windus career series and tells the story of two brothers who decided, respectively, to become a solicitor and a barrister. When it is remembered that less than 10 per cent. of practising lawyers are barristers, this book clearly fails in its task of presenting a balanced picture of the profession to boys wishing to undertake it. It is devoted largely to the career of the brother who is becoming a barrister and this emphasis is entirely misplaced. The life of the young barrister is over-romanticised and much of the bread and butter work of solicitors is not even referred to. If a young man wants to know something of the life of a solicitor, he should look elsewhere than in this book.

P. A.

Advocates of the Golden Age. By Lewis Broad. London: John Long. 1958. 274 and (index) 8 pp. (21s. net.)

Mr. Lewis Broad is well equipped to write biographies, having written one of Sir Winston Churchill and another of Sir Anthony Eden. In the criminal field he has also written about Edith Thompson and Oscar Wilde.

In this book Mr. Broad has presented short biographies of Marshall Hall, Carson, Rufus Isaacs and F. E. Smith and each of these is an extremely interesting and readable summary of their lives. Each presents a fair analysis of the art of advocacy practised by each of the characters. The book is a very good introduction to some of the fuller biographies referred to at the back.

P. A.

Books Received:

La Querela. By Professor Giulio Battaglini. Turin: Utet. 1958. 469 and (index and tables) 74 pp. (4,000 lire.)

Readers' Digest:

Appeal: Appeal from the Divisional Court in criminal matters: 226 *Law Times* 233.

Evidence: Corroboration of accomplices: 108 *Law Journal* 692.

Lotteries: Practical reflections on lotteries: 66 *Police Review* 724.

Magistrates' courts: Summary trial of indictable offence: 122 *Justice of the Peace* 664.

Penology: Treatment of offenders: the non-prison sentence: 226 *Law Times* 204.

Scotland: The nature and status of precognitions: 1958 *Scots Law Times* 205.

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Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter " r " appears in brackets (r) do not roll it. The letter " a " by itself is long, as in bay.]

A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].
Ab initio—from the beginning [ab in-*ish*-ee-oh].
Ab ovo—from the beginning [ab oh-voh].
Actus reus—guilty act [*act*-us *ree*-us].
Aliter—in other words [*al*-it-er].
Animus furandi—intent to steal [*an*-imus fur-*and*-eye].
Ceteris paribus—other things being equal [*ket*-e-riss parry-bus].
De minimis non curat lex—the law does not concern itself with trifles [de minny-miss non *cure*-at-lex].
De novo—anew [dee no-voh].
Ejusdem generis—of the same kind or nature [*ee*-juss-dem *gen*-er-iss].
Ex abundanti cautela—from an excess of caution [ex ab-unt-*ant*-eye caw-telle(r)].
In camera—the hearing of a case in private.
In toto—in entirety [in toe-toe].
Inter alia—among other things [in-ter *a*-lea(r)].
Ipso facto—by the mere fact [*ip*-so fact-oh].
Locum tenens—deputy [*lock*-um ten-ens].
Locus in quo—the place in which [*lock*-us in quoh].
Malitia—malice [*mall*-ish-a].
Malum in se—evil in itself [*mall*-um in sea].
Malus animus—evil intent [*mall*-us annie-mus].
Mens mala, mala mens—evil mind [men's *mall*-e(r)].
Mens rea, guilty mind [men's rea(r)].
Mutatis mutandis—the necessary changes being made [mew-*tate*-iss mew-*tan*-diss].
Nemo dat quod non habet—no one gives who does not possess [*nee*-mo dat quod non hab-et].
Nemo tenetur seipsum accusare—no one is bound to incriminate himself [*nee*-mo ten-*ee*-te(r) see-*ip*-sum ac*cuse-ah*-ree].
Nolle prosequi—an act of the Attorney-General to stay proceedings [nolly prossy-kwy].
Non sequitur—it does not follow [non sek-wit-e(r)].
Obiter dictum—a mere saying by the way, a chance remark, which is not binding on the court [*oh*-bitter *dick*-tum].
Omnia praesumuntur rite esse acta—all acts are presumed to have been done rightly [*om*-nea(r) pre*sume*-unter *ree*-tay *essay acte*(r)].
Per curiam—by the court [per *cure*-ee-am].
Per infortuniam—by accident [per-in-for*tune*-ee-am].
Petitio principii—begging the question, a logical fallacy [pet-*ish*-ee-oh prince-*ip*-ee-eye].
Praecogitata—aforethought [pre-coj-it-ayte(r)].
Quis custodiet . . .? Quis custodiet ipsos custodes?—who guards the guards? [*quise* cust-*oh*-dee-et ip-*so*-ss cust-oh-*dees*].
Quod nota—which should be noted [quod note(r)].
Ratio decidendi—the reason or ground of a judicial decision [ray-*she*-oh *dee*-sid-end-eye].
Reductio ad absurdum—reduction to absurdity; pushing a principle to unpractical and ridiculous lengths [ree-*duck*-she-oh ad ab*surd*-um].
Se defendendo—in self-defence [sea dee-*fend-end*-oh].
Status quo—the current state of affairs [*stay*-tus quoh].
Venire de novo—the Court of Criminal Appeal, where it holds that the trial of the appellant was a nullity, may order that the appellant be tried on the indictment [ven-*ear*-ee dee no-voh].
Via media—middle road [*vee*-ah *me*-dea(r)].

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